

21
No. 88-1640-CFX
Status: GRANTED

Title: Michigan Citizens for an Independent Press, et al.,
Petitioners
v.
Dick Thornburgh, Attorney General of the United
States, et al.

Docketed:
April 5, 1989

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Schultz, William B.

Counsel for respondent: Solicitor General, Clifford, Clark
M., Smith, John Stuart

Entry	Date	Note	Proceedings and Orders
1	Mar 2 1989	D	Application (A88-695) for a stay pending the timely filing and disposition of a petition for a writ of certiorari, submitted to The Chief Justice.
2	Mar 3 1989		Response to application (A88-695) filed by Detroit Free Press, Inc..
3	Mar 3 1989		Application (A88-695) denied by the Chief Justice.
4	Mar 3 1989	G	Application (A88-695) refiled and submitted to Justice Brennan.
5	Mar 4 1989		Application (A88-695) granted by Justice Brennan.
6	Mar 4 1989		(A88-695) Application referred to Conference by Justice Brennan; March 17, 1989
7	Mar 7 1989		(A88-695) Reply brief filed.
8	Mar 20 1989		(A88-695) The application for stay presented to Justice Brennan and by him referred to the Court is denied. The order heretofore entered March 4, 1989 by Justice Brennan is vacated. Justice Blackmun and Justice Stevens would grant the stay.
9	Apr 5 1989	G	Petition for writ of certiorari filed.
10	Apr 5 1989		Appendix of petitioner filed.
11	Apr 5 1989		Lodging received. (Volumes I & II).
12	Apr 12 1989		Brief of respondent Detroit Free Press, Inc. in opposition filed.
13	Apr 12 1989		Brief of respondent The Detroit News, Inc. in opposition filed.
14	Apr 12 1989		Brief of respondent Attorney General of the United States in opposition filed.
15	Apr 12 1989		DISTRIBUTED. April 28, 1989
16	Apr 19 1989	X	Reply brief of petitioners Michigan Citizens, et al. filed.
17	May 1 1989		Petition GRANTED. Justice White OUT. *****
19	May 31 1989		Order extending time to file brief of petitioner on the merits until June 30, 1989.
20	Jun 2 1989	G	Motion of the parties to dispense with printing the joint appendix filed.
21	Jun 12 1989		Record filed.
		*	Certified copy of original record and proceedings received. (Box).
23	Jun 19 1989		*Pursuant to the Court's Order, a bound joint appendix reproduced on 8-1/2 X 11 inch size will be LODGED in

Entry	Date	Note	Proceedings and Orders
			lieu of a printed joint appendix.
24	Jun 19 1989		Request for further extension of time to file petitioners' brief on the merits DENIED.
50	Jun 19 1989		Motion of the parties to dispense with printing the joint appendix GRANTED. White, J., OUT.
25	Jun 30 1989		Brief amicus curiae of Little Rock Newspapers, Inc. filed.
26	Jun 30 1989		Brief amicus curiae of AFL-CIO filed.
27	Jun 30 1989		Brief amici curiae of Michigan Citizens for An Independent Press etc., et al. filed.
28	Jun 30 1989		JOINT APPENDIX LODGED
29	Jun 30 1989		Brief of petitioners Michigan Citizens, et al. filed.
30	Jun 30 1989		Lodging received.
31	Jul 15 1989	D	Motion of the Acting Solicitor General for divided argument filed.
33	Jul 21 1989		Order extending time to file brief of respondent on the merits until August 11, 1989.
41	Aug 9 1989		Brief of respondent The Detroit News, Inc. filed.
34	Aug 10 1989		Brief amici curiae of James Blanchard, et al. filed.
35	Aug 11 1989		Brief amicus curiae of American Newspaper Publishers Assn. filed.
36	Aug 11 1989		Brief amicus curiae of Union Leaders Representing Detroit Free Press Employees filed.
37	Aug 11 1989		Brief amici curiae of Jane Daugherty, et al. filed.
38	Aug 11 1989		Brief amici curiae of Detroit Renaissance, Inc., et al. filed.
39	Aug 11 1989		Brief amici curiae of Newspaper Drivers & Handlers, et al. filed.
40	Aug 11 1989		Brief of respondent Detroit Free Press, Inc. filed.
42	Aug 11 1989		Brief of respondent Dick Thornburg, Attorney General filed.
43	Aug 24 1989		CIRCULATED.
45	Aug 28 1989		SET FOR ARGUMENT MONDAY, OCTOBER 30, 1989. (4TH CASE)
51	Aug 30 1989		Motion of the Acting Solicitor General for divided argument DENIED. White, J., OUT.
46	Sep 11 1989	X	Reply brief of petitioners Michigan Citizens, et al. filed.
47	Sep 11 1989		Lodging received.
48	Sep 25 1989	D	Motion of respondent Detroit Free Press for reconsideration of the order denying the motion of divided argument filed.
49	Oct 10 1989		Motion of respondent Detroit Free Press for reconsideration of the order denying the motion of divided argument DENIED. Justice White OUT.
52	Oct 30 1989		ARGUED.

88-1640 (1)

No. 88-

Supreme Court, U.S.

FILED

APR 5 1989

JOSEPH F. SPANIO, J.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

3272

QUESTIONS PRESENTED

1. Does this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), require a reviewing court to defer to an administrative agency's expansive construction of an exemption from the antitrust laws, even if the court concludes that the agency's construction is at odds with the established rule that antitrust exemptions must be narrowly construed?

2. In determining whether two newspapers that are competitive equals qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that requires only (a) a showing that both papers have lost money for several years, and (b) a representation by the "non-failing" paper that it will not raise its prices even if the exemption is denied?

PARTIES TO THIS PROCEEDING

Petitioners Michigan Citizens for an Independent Press, Public Citizen, Senator John F. Kelly, W. Edward Wendover, David A. Kersh, William B. Cowan, Matthew Beer, and Murray Greenhalge, Jr., appeared as plaintiffs-appellants below. In addition, Robert G. Tesmar appeared as a plaintiff in the district court.

Respondents United States Attorney General Richard Thornburgh, Detroit Free Press (owned by Knight-Ridder, Inc.) and The Detroit News (owned by Gannett Co.) appeared as defendants-appellees below.

In addition, the American Newspaper Publishers Association and Little Rock Newspapers, Inc., appeared as *amici curiae* in the court of appeals.

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	2
STATEMENT	4
REASONS FOR GRANTING THE PETITION	12
I. The Decision Below Improperly Extends <i>Chevron</i> and Will Have a Broad Impact on Antitrust Laws That Are Enforced by Administrative Agencies	13
II. The Attorney General's Interpretation Emasculates the Newspaper Preservation Act and Jeopardizes the Independence of Newspapers in 25 Cities	18
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	Page:
<i>Amoco Production Company v. Gambell</i> , 480 U.S. 531 (1987)	17
<i>Bowen v. American Hospital Association</i> , 476 U.S. 610 (1986)	17
<i>Chevron, U.S.A. v. Natural Resources</i> <i>Defense Council</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Citizen Publishing Company v. United States</i> , 394 U.S. 131 (1969)	18
<i>Committee for an Independent P-I v. Hearst</i> <i>Corp.</i> , 704 F.2d 467 (9th Cir.), <i>cert. denied</i> , 464 U.S. 892 (1983)	9, 14
<i>Federal Maritime Commission v. Seatrain</i> , 411 U.S. 726 (1973)	15
<i>Federal Trade Commission v. Indiana</i> <i>Federation of Dentists</i> , 476 U.S. 447 (1986)	16-17
<i>Group Life & Health Insurance Co. v.</i> <i>Royal Drug Co.</i> , 440 U.S. 205 (1979)	13, 14
<i>Immigration Naturalization Service v.</i> <i>Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	17
<i>Louisiana Public Service Commission v. FCC</i> , 476 U.S. 355 (1986)	17
<i>Matsushita Electric Industrial Co. v. Zenith</i> <i>Radio Corp.</i> , 475 U.S. 574 (1986)	22
<i>Niagara Frontier Tariff Bureau, Inc. v.</i> <i>United States</i> , 826 F.2d 1186 (2d Cir. 1987)	13-14

<i>Sorenson v. Secretary of Treasury</i> , 475 U.S. 851 (1986)	17
<i>Square D v. Niagara Frontier Tariff Bureau</i> , 476 U.S. 409 (1986)	13
<i>United States v. First City National Bank</i> , 386 U.S. 361 (1967)	15-16
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	19
Statutes and Regulations:	
Bank Merger Act, 12 U.S.C. § 1828 (c) (5) (B)	15
Export Trading Company Act, 15 U.S.C. §§ 4001, <i>et seq.</i>	16
Federal Aviation Act, 49 U.S.C. §§ 1378, 1382	16
Federal Trade Commission Act, 15 U.S.C. § 45	16
Fishers Coop Marketing Act, 15 U.S.C. §§ 521, 522	16
Interstate Commerce Act, 49 U.S.C. §§ 11343, 11344	16
Newspaper Preservation Act, 15 U.S.C. §§ 1801, <i>et seq.</i> ,	2, 4
15 U.S.C. § 1801	24
15 U.S.C. § 1802(5)	2, 4, 18
15 U.S.C. § 1803 (a)	2, 18
15 U.S.C. § 1803(b)	2-3, 4, 18-19
15 U.S.C. § 1803(c)	3, 22

Shipping Act of 1916, 46 U.S.C. § 814	14-15
28 U.S.C. § 1254(1)	2
28 C.F.R. § 48.7 (1988)	4
28 C.F.R. § 48.10(a)(4)(1988)	3, 8, 19

Other Authorities:

H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. (1970)	19
S. Rep. No. 91-535, 91st Cong., 1st Sess. (1969)	19
S. 1520, 91st Cong., 2d Sess. (1969)	18
116 Cong. Rec. 23,146 (1970)	19
116 Cong. Rec. 23,154 (1970)	19

No. 88-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The majority and dissenting opinions of the panel, the judgment of the panel, and the opinions concurring and dissenting in the court of appeals' order denying rehearing *en banc* are not yet reported, but appear in the separately bound appendix at Pet. App. 164a-211a. The opinion of the district court is reported at 695 F. Supp. 1216 and also appears at Pet. App. 149a-163a. The Decision and Order of the Attorney General, which is not reported, appears at Pet. App. 136a-147a. In addition, the Recommended Decision of the Administrative Law Judge appears at Pet. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and the order denying rehearing *en banc* was entered on February 24, 1989 (Pet. App. 164a, 199a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Newspaper Preservation Act, 15 U.S.C. §§ 1801, *et seq.*, provides in pertinent part:

Section 1802(5): The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

Section 1803: (a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew or amend any joint operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication . . .

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper

publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

The Department of Justice's regulations pertaining to the Newspaper Preservation Act, 28 C.F.R. § 48 (1988), state in pertinent part:

Section 48.10 Hearings: (a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Procedure Act, 5 U.S.C. 3105. The administrative law judge shall:

* * *

(4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement.

STATEMENT

1. On May 9, 1986, respondents Detroit Free Press (the "Free Press") and The Detroit News (the "News") filed an application with the respondent Attorney General for approval of a joint operating arrangement ("JOA") pursuant to the Newspaper Preservation Act (the "NPA" or the "Act"), 15 U.S.C. §§ 1801, *et seq.* Detroit is the nation's fifth largest newspaper market. The Free Press, the nation's eighth largest newspaper, is Detroit's dominant daily morning newspaper, and the News, the nation's seventh largest paper, is the city's only afternoon daily newspaper. Pet. App. 7a, 14a.

The NPA authorizes the Attorney General to grant an antitrust exemption to newspapers that seek to operate under a joint operating arrangement. 15 U.S.C. § 1803(b). However, the Act limits the exemption to situations where one of the newspapers can demonstrate that it is a "failing newspaper," which the Act defines as a "newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. §§ 1802(5) & 1803(b). The application identified the Free Press as the "failing newspaper" for purposes of the NPA. Pet. App. 137a.

The JOA at issue here provides that the Detroit market would be divided between the two newspapers for the next 100 years, with the Free Press publishing the morning newspaper and the News publishing the afternoon newspaper. Under the JOA, the papers would form a partnership known as "The Detroit News Agency," which would make all commercial decisions for both papers, including setting their sales prices and advertising rates. The News would receive 55% of the profits during the first year, but that percentage would decrease until the sixth year, after which the profits would be evenly divided. Pet. App. 173a.

In accordance with the Department of Justice's regulations, 28 C.F.R. § 48.7 (1988), the application was referred to then-

Assistant Attorney General for Antitrust Douglas H. Ginsburg, who concluded in a 70-page report that the applicants had not carried their burden of establishing that the Free Press was a failing newspaper. As support for this conclusion, he pointed out that there is a serious question as to why the News is "willing to share 50% of the profits of the JOA with the Free Press (after the first five years) if, as the parties assert, 'the inescapable conclusion [is] that the financial losses of the Free Press will continue indefinitely [absent a JOA]'" Report of the Assistant Attorney General (July 23, 1986), pp. 66-67 (brackets in original). However, to give the applicants another opportunity to prove their case, Assistant Attorney General Ginsburg recommended that Attorney General Edwin Meese III appoint an administrative law judge to hear evidence. *Id.* at 70.¹

2. On February 25, 1987, Attorney General Meese referred the application to Administrative Law Judge ("ALJ") Morton Needelman, who presided over a three-week evidentiary hearing, at which 16 witnesses testified, and at which a number of parties, including the Justice Department's Antitrust Division, opposed the JOA. Pet. App. 1a. On December 29, 1987, Judge Needelman issued a 129-page recommended decision in which he made numerous findings of fact and concluded that the JOA should be denied. *Id.* Although Attorney General Meese ultimately approved the JOA, he expressly "accept[ed] as accurate the fact findings of the Administrative Law Judge." Pet. App. 147a.²

The fundamental issue before the ALJ was whether the Free

¹The Assistant Attorney General's Report is reprinted at pages 424-509 of the joint appendix that was filed in the court of appeals ("Joint Appendix"), a copy of which has been lodged with the Clerk of this Court.

²The Antitrust Division's Post-Hearing Brief opposing the JOA appears at pages 510-39 of the Joint Appendix.

Press was in "probable danger of financial failure." In order to resolve this question, the ALJ had to determine why the Free Press had been losing money and whether it would continue to do so if the JOA were denied. Based on the evidence in the record, Judge Needelman made a number of critical factual findings on these issues.

First, he found that Detroit could support two profitable newspapers, and thus that the Free Press's financial troubles were not due to any inherent weakness in the relevant market. Pet. App. 95a.

Second, he agreed with the Antitrust Division that during the 10 years prior to filing their JOA application, the two papers had been essentially competitive equals. Pet. App. 31a, 32a-85a. Thus, although in 1960 the News had had a "substantial lead (183,751) over the Free Press in daily circulation," by 1976 "the daily circulation battle ha[d] been fought to a virtual tie," and between 1976 and 1986 "the Free Press's share of total daily circulation never fell below 49%." Pet. App. 40a. While the News led in advertising, the Free Press was dominant in the morning market and had other clear advantages over the News. Pet. App. 31a-39a, 106a-108a. The profit split, which the ALJ concluded would be "essentially . . . 50/50" (Pet. App. 122a), is especially relevant because it strongly suggests, as the Antitrust Division had argued, that both papers had concluded that they were at competitive parity.

Moreover, as the ALJ found, only two months prior to the time that the JOA was signed, one of the expert witnesses for the applicants, newspaper analyst John W. Morton, "was of the view that if the Detroit newspaper war was to continue the News was 'at greater risk' than the Free Press." Pet. App. 112a. "Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News." *Id.* According to the ALJ, "as late as June 1986 [a month *after* the

application for a JOA had been filed, David] Lawrence, the Free Press's publisher, was planning for an expansion 'regardless of the outcome of the JOA.'" Pet. App. 104a n.242.

Third, the ALJ found that the Free Press had lost approximately \$10 million per year since 1980, but that the News had lost almost as much, and that the reason for these losses was that the papers' circulation and advertising prices were probably the lowest in the country for major daily newspapers. Pet. App. 70a, 76a, 82a, 84a; *see also* Panel Opinion at Pet. App. 172a. For example, the daily price of the News is 15 cents, whereas the Free Press charges 20 cents. Pet. App. 172a. In Judge Needelman's words, "Detroit cannot sustain two profitable papers when both are practically being given away." Pet. App. 122a.

Fourth, the ALJ discussed the motivation for the low prices. He found that in 1981, after the papers had suffered their first year or two of losses in many years, the Chief Executive Officers of Knight-Ridder, Inc., which owned the Free Press, and the Evening News Association, which then owned the News, had met and "emphasized that one or both newspapers needed to continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects of a JOA would be 'ironclad.'" Pet. App. 19a. The ALJ also found that the Free Press subsequently adopted a marketing strategy with the objective of "achiev[ing] profitability through total market dominance . . . , and if that should fail, to force the News to accept a JOA on the Free Press's terms." Pet. App. 21a. Moreover, before purchasing the News in 1986, Gannett Company contacted Knight-Ridder "to determine if [it] was still interested in forming a JOA." Pet. App. 29a.

Fifth, the ALJ addressed the issue of whether the News was likely to raise its prices if the JOA were denied, which the News would have to do to return to profitability. This issue was critical because the ALJ found, and the Attorney General agreed, that a price rise by the News would enable the Free Press to become

immediately profitable, eliminating any justification for a JOA. Pet. App. 95a-100a, 122a, 143a. On this critical issue, the ALJ found that the applicants had not met their burden of proving that the News was likely to continue to keep its prices low (and thereby to lose money indefinitely), and that instead the evidence demonstrated that the papers might raise their prices if the JOA were denied. Pet. App. 92a, 132a; *see also* 28 C.F.R. § 48.10(a)(4) (1988) (burden of proving all pertinent issues on the proponents of the JOA).

Sixth, the ALJ evaluated the testimony of Knight-Ridder's CEO that he would recommend closing the Free Press if the JOA were disapproved. According to the ALJ, "[t]he record . . . contains no convincing evidence that he seriously considered closing the Free Press prior to his witness stand bolt out of the blue and accordingly I have assigned little weight to this threat." Pet. App. 104a. To support his conclusion, he noted that "[t]here are no contemporaneous documents indicating that this recommendation had been pressed before the Knight-Ridder Board; on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied." Pet. App. 104a.³

3. On August 8, 1988, Attorney General Edwin Meese III rejected the recommendations of the ALJ and the Antitrust

³After the ALJ issued his decision, the newspapers and the six unions that had opposed the JOA before the ALJ executed an agreement whereby the union employees were given bonuses and certain guarantees in exchange for withdrawing from the administrative proceedings. Joint Appendix, pp. 657, 661-62. Although the unions have taken no position in this litigation, many employees of the two newspapers continue to oppose the JOA. *See infra* p. 10 n. 4.

Division and approved the application. He made no additional factual findings and expressly stated that he accepted the fact findings of the ALJ. Pet. App. 147a. In his opinion, the Attorney General acknowledged that this application was unlike any JOA that the Department had ever evaluated. Pet. App. 139a. In each of the four prior JOA applications that had been considered since Congress adopted the NPA in 1970, one paper had been dominant and profitable, whereas the "failing" paper had not been profitable for a number of years, but instead was in a classic "downward spiral," where circulation and advertising were declining, generally in increasing amounts each year. Pet. App. 141a.

In order to approve the JOA, the Attorney General had to construe the term "probable danger of financial failure" to apply in a market where both newspapers were competitively equal and had been losing roughly equal amounts of money due to a price war. He purported to follow the construction of the Act that the Ninth Circuit adopted in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) ("*Hearst*"), under which the applicants were required to show that the Free Press was "suffering losses which more than likely cannot be reversed." Pet. App. 142a, 144a. The Ninth Circuit, however, had applied this test to a newspaper that was on a downward spiral in a market where its competitor was clearly dominant and profitable (704 F.2d at 471, 479), whereas in the case of Detroit the Free Press was *not* on a downward spiral and the News was not clearly dominant. *See supra* pp. 6-7. Furthermore, even though both the Antitrust Division (Joint Appendix, p. 449) and the *Hearst* court had concluded that the NPA should be interpreted narrowly in light of the rule that exemptions from the antitrust laws must be narrowly construed, the Attorney General nowhere stated that he took that rule into consideration.

In concluding that the JOA should be granted, Attorney

General Meese acknowledged that both papers could become profitable if circulation and advertising prices were increased, but he pointed out that the Free Press could not increase its prices unless the News did the same. Pet. App. 143a. Relying on testimony of Gannett officials that the News would not raise prices even if the JOA were denied, the Attorney General concluded that it was "probable" that the Free Press would continue to suffer losses if he declined to approve the JOA. Pet. App. 144a. On that basis, Attorney General Meese granted the application.

4. Petitioners filed this case in the United States District Court for the District of Columbia on August 16, 1988.⁴ The defendants below and respondents here are the Attorney General of the United States, the Free Press, and the News. On August 17, 1988, District Judge Joyce Hens Green stayed the Attorney General's order, but thereafter Judge George H. Revercomb ruled against petitioners on the merits. Relying on *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), Judge Revercomb concluded that the courts were required to "grant considerable deference" to the Attorney General's interpretation of the NPA. Pet. App. 155a. On that basis, he held that the Free Press could qualify as a "failing" newspaper by demonstrating that it had suffered losses for a number of years and had "no unilateral

⁴Petitioners are Michigan Citizens for an Independent Press ("Michigan Citizens"), Public Citizen, and six individuals. Michigan Citizens has over 500 members, including approximately 200 employees of either the News or the Free Press, more than 300 readers, and 13 advertisers of one or both papers. The individual petitioners represent the same range of interests as Michigan Citizens. Public Citizen is a national consumer organization which brought this action on behalf of its members in the Detroit area, as well as its members nationwide who would be adversely affected if the JOA in this case were approved.

way out" of its loss position (since the Free Press could not raise its prices if the News decided to maintain its unprofitably low prices). Pet. App. 156a, 157a-58a.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. The central holding of Judge Laurence Silberman's majority opinion was that, in view of this Court's decision in *Chevron*, the Attorney General was not required to apply the rule of statutory construction that exemptions from the antitrust laws are to be narrowly construed. Pet. App. 177a-78a, 179a-80a. On this question, the panel majority held that, under *Chevron*, the courts are required to defer to the Attorney General's construction, even if that construction is in conflict with a recognized rule of statutory interpretation. Having resolved the legal issue in the Attorney General's favor, the panel then sustained the Attorney General's decision, relying principally on the losses that both papers had suffered and the fact that a price increase by the Free Press, which is its key to profitability, was dependent on a price increase by the News.

Judge Ruth B. Ginsburg dissented. Pet. App. 191a. In her view, both the Attorney General and the courts are required to apply the rule that the antitrust exemptions must be narrowly construed, even after *Chevron*. Pet. App. 195a-96a. If the NPA were properly construed, she reasoned, the Attorney General's decision could not be sustained. In particular, Judge Ginsburg relied on: the contrary position of both the Antitrust Division and the ALJ (Pet. App. 191a-92a & n.3, 194a n.5); the "concession that both newspapers, by their own projections, 'could achieve profitability with price increases and the elimination of discounting' [of advertising]" (Pet. App. 196a, quoting Attorney General's Decision at Pet. App. 140a); and the "burden of proof which JOA applicants bear" (Pet. App. 196a). Judge Ginsburg concluded that the case should have been remanded to "give the Attorney General an opportunity to state more comprehensively

why the JOA route is ripe for his approbation now." *Id.*

The court of appeals denied rehearing *en banc* by a vote of 5-4. Chief Judge Wald, in an opinion joined by Judges Mikva and Edwards, dissented on the ground that the predicate for the Attorney General's decision — that if the JOA were denied, the News would not raise its prices, causing the Free Press to continue to lose money — made "no economic sense" because such a course of action would mean that the News would also continue to suffer deep losses. Pet. App. 205a. In response, the panel majority filed an opinion emphasizing that its decision was required by "*Chevron's* restraining leash." Pet. App. 200a.⁵

Petitioners then applied to this Court for a continuance of the stays that had been entered by the district court and the court of appeals. Chief Justice Rehnquist initially denied the application, but on March 4, 1989, Justice Brennan granted it. However, on March 20, 1989, the Court issued an order vacating the stay, with a notation that Justices Blackmun and Stevens would have granted the application. Although the Free Press had opposed the application in this Court, as it did in the courts below, the newspapers announced on March 21, 1989, that they would not implement the JOA while this Court considers this petition.

REASONS FOR GRANTING THE PETITION

For the first time in the 19 year history of the Newspaper Preservation Act, the Attorney General has approved a joint operating arrangement where the losses that the papers have suffered are the product of vigorous competition, intended to achieve either dominance (which had proved to be an elusive goal for both papers), or the enormous monopoly profits that

⁵Judges Starr and D. H. Ginsburg did not participate. Judge Ruth B. Ginsburg voted to grant rehearing, but did not join Chief Judge Wald's opinion.

accompany a JOA. Unlike every application that preceded this one, the JOA at issue here does not involve one paper that is dominant and profitable, and a second paper that is both not profitable and losing ground in circulation and advertising. To the contrary, it is not disputed that both papers could quickly be restored to profitability through modest price increases — increases which would bring circulation prices and advertising rates in line with virtually all other papers in the country.

Moreover, the Attorney General's construction of the Newspaper Preservation Act, which the court below upheld, threatens the independence of the papers in the 25 cities that have competing dailies, since it provides a roadmap for profitable papers to obtain a JOA, and the monopoly profits that can be obtained in a non-competitive market. That decision would also expand the *Chevron* rule of deference to the point where agencies would be free to ignore rules of construction that have long guided courts, Congress, and administrative agencies. Finally, the decision would have a substantial impact on other antitrust laws that are implemented by federal agencies, since those agencies would be free to adopt an expansive construction of antitrust exemptions, and the courts would be barred by the panel's expansive reading of *Chevron* from correcting all but the most egregious interpretations.

I. The Decision Below Improperly Extends *Chevron* and Will Have a Broad Impact on Antitrust Laws That Are Enforced by Administrative Agencies.

The panel held that this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council, supra*, excused the Attorney General from applying the rule that exemptions from the antitrust laws must be narrowly construed and required the court to defer to his approach to statutory interpretation. That rule is a firmly embedded one, *see, e.g., Group Life & Health*

Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979), which this Court has reaffirmed since the *Chevron* decision. *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986) (“exemptions from the antitrust laws are to be strictly construed and strongly disfavored”); see also, e.g., *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190-91 (2d Cir. 1987) (court’s review of agency action guided by both the rule applicable to antitrust exemptions and by *Chevron*). No court had previously suggested that an administrative agency or a court has the authority to ignore it under *Chevron* or any other rationale.

Even the panel recognized both that the Attorney General’s interpretation of the statute was a significant departure from past interpretations of the NPA and that his construction of the Act would have been impermissible if he had been required to adhere to the antitrust rule of statutory construction. Pet. App. 180a. Furthermore, in *Committee for an Independent P-I v. Hearst Corp.*, *supra*, the Ninth Circuit expressly held that the rule of statutory construction limited the Attorney General’s discretion. Thus, the panel decision below is in conflict with the only other circuit court decision interpreting the NPA.

Although *Hearst* predated *Chevron*, the Ninth Circuit applied a standard very similar to the one adopted in *Chevron*. It held that courts must defer to an “administrative construction of a statute” if the agency’s construction is “reasonable . . . and consistent with the intent of Congress.” 704 F.2d at 473. However, in the very next sentence of its opinion, the court emphasized that both it and the Attorney General must be “guided by an additional rule developed out of the court’s recognition of the fundamental importance of the antitrust laws — exemptions to the antitrust laws are to be narrowly construed.” *Id.*, citing *Group Life and Health Ins. Co. v. Royal Drug Co.*, *supra*.

Despite these decisions, the panel in this case held that “*Chevron* implicitly precludes courts picking and choosing

among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes.” Pet. App. 180a (emphasis in original). The panel’s opinion not only jeopardizes the proper implementation of the NPA, but it also could have a major impact on other antitrust laws that are interpreted by administrative agencies. For example, when the Federal Maritime Commission held, under section 15 of the Shipping Act of 1916, 46 U.S.C. § 814, that a contract involving the purchase of one shipping company by another was an “agreement” within the meaning of that Act, and thus subject to the FMC’s approval and grant of antitrust immunity, this Court disagreed, even though “the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition-of-assets agreements.” *Federal Maritime Commission v. Seatrain*, 411 U.S. 726, 731 (1973). According to the Court, a ruling sustaining the Commission’s “broad reading of [the statute] would conflict with our frequently expressed view that exemptions from the antitrust laws are strictly construed.” *Id.* at 733.

The panel’s analysis is flatly inconsistent with *Seatrain*. Indeed, applying the panel’s method of statutory construction would have led to the opposite result in *Seatrain* since this Court relied on the antitrust canon to reverse the Commission’s expansive construction of the Shipping Act. The seriousness of the panel’s misapplication of *Chevron* is underscored by this Court’s citation to the *Seatrain* decision in *Chevron*, for the proposition that the courts must continue to use “traditional tools of statutory construction” in determining whether an agency’s construction of a statute is “contrary to clear congressional intent.” 467 U.S. at 843 n.9.

The panel’s decision also conflicts with this Court’s construction of the Bank Merger Act. Under that Act, the Comptroller of the Currency has the authority to approve mergers after weighing their “anticompetitive effects” against the “probable effect of the transaction in meeting the convenience and needs of the commu-

nity." 12 U.S.C. § 1828(c)(5)(B). Although the Comptroller initially decides whether to approve the merger, "it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal." *United States v. First City National Bank*, 386 U.S. 361, 369 (1967). In *First City National Bank*, this Court stressed that:

Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure.

Id. at 367. This principle, which is directly at odds with the majority decision below, also applies to antitrust issues that other agencies are entrusted with deciding under other antitrust statutes. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45 (Federal Trade Commission may prohibit "unfair methods of competition"); Fishers Coop Marketing Act, 15 U.S.C. §§ 521, 522 (Secretary of Commerce may order associations to "cease and desist" if he finds that the "association monopolizes or restrains trade . . . to such an extent that the price of any aquatic product is unduly enhanced"); Export Trading Company Act, 15 U.S.C. §§ 4001, *et seq.* (Secretary of Commerce may exempt persons in export trade from antitrust laws upon showing that there will be no "substantial lessening of competition" and no "unfair methods of competition"); Federal Aviation Act, 49 U.S.C. §§ 1378, 1382 (Department of Transportation may approve certain airline mergers and pooling agreements unless they substantially lessen or eliminate competition, in which case applicants must also demonstrate that the arrangement is necessary to meet significant transportation needs of the public); Interstate Commerce Act, 49 U.S.C. §§ 11343, 11344 (ICC may approve certain acquisitions and mergers taking into account

"effect on the adequacy of transportation" and possible "adverse effect[s] in competition"). The panel's approach to statutory interpretation is also at odds with this Court's post-*Chevron* construction of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), where it held that, although the FTC is entitled to "some deference," "identification of governing legal standards and their application to the facts found [are] for the courts to resolve."

Moreover, the implications of the panel's decision extend beyond the antitrust laws, since it also permits administrative agencies to disregard other firmly established rules of statutory construction. By dismissing such rules, the panel eliminated a key tool that the courts have historically used to evaluate the reasonableness of an agency's statutory interpretation, a tool that this Court has also frequently employed in reviewing agency decisions, even after *Chevron*. *See, e.g.*, *Bowen v. American Hospital Association*, 476 U.S. 610, 644 n.33 (1986) (reference to the rule of strict construction of statutes in derogation of sovereignty); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 555 (1987) (reference to "familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians," although rule not applicable in that case); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (reference to "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," although it was unnecessary to rely on the rule in reversing the agency); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning").

Insofar as we have been able to determine, this Court has never

suggested that *Chevron* modifies these traditional rules of statutory construction, let alone one that is as important as the rule at issue here.

II. The Attorney General's Interpretation Emasculates the Newspaper Preservation Act and Jeopardizes the Independence of Newspapers in 25 Cities.

In *Citizen Publishing Company v. United States*, 394 U.S. 131 (1969), this Court held that joint operating arrangements violate the price-fixing and monopolization restrictions in the Sherman Act and the prohibition against anti-competitive mergers in the Clayton Act, unless one of the newspapers can demonstrate that it is a "failing company." Congress passed the Newspaper Preservation Act both to resolve the uncertainty created by *Citizen Publishing* about the validity of the 22 JOAs then in existence, and to define the standard applicable to future JOAs.

The NPA adopted two very different standards for JOAs, depending on whether the agreement was executed before or after July 24, 1970, the effective date of the new law. Recognizing that a demanding standard might pose a hardship for newspapers that had been operating under a JOA for many years, Congress provided that pre-enactment JOAs would be exempt if, at the time the agreement was executed, one of the parties to the agreement was not "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

Initially, the Senate proposed that this standard govern post-enactment JOAs as well. S. 1520, 91st Cong., 2d Sess. § 3(5) (1969). However, Congress ultimately adopted a significantly more rigorous standard for future JOAs, which requires prior approval by the Attorney General and which authorizes a JOA only if one of the papers is a "failing newspaper." The Act defines that term as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial

failure," and it permits the Attorney General to approve a JOA only if the arrangement furthers "the policy and purpose" of the Act. 15 U.S.C. §§ 1802(5) & 1803(b). Congress intended this to be a "tougher" and "much more stringent standard" than the "not likely to remain or become financially sound" standard which applied to pre-1970 JOAs. 116 Cong. Rec. 23154-55 (1970) (remarks of Congressman Railsback); *see also* H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 10 (1970) (standard applicable to pre-1970 JOAs "less strict" than standard applicable to post-1970 JOAs).

In the legislative history of the NPA, Congress emphasized that the "probable danger of financial failure" standard is to be read in light of this Court's decision in *United States v. Third National Bank*, 390 U.S. 171 (1968) ("*Third National Bank*"). S. Rep. No. 91-535, 91st Cong., 1st Sess. 2 (1969); 116 Cong. Rec. 23,146 (1970) (Congressman Kastenmeier). That decision interprets the provisions of the Bank Merger Act of 1966, under which a similar exemption from the antitrust laws is available. Congress's reference to the Bank Merger Act is significant because in *Third National Bank* this Court had held that Congress had required banks to "reliably establish the unavailability of alternative solutions to the woes" of the bank in order to obtain the exemption. 390 U.S. at 190. Indeed, the Court's opinion suggests that, unless the difficulties faced by the bank were "insoluble," or close to insoluble, the merger must be rejected. *Id.* at 190-91.

Thus, the structure of the NPA, its legislative history, and even the Justice Department's regulations, under which the applicants have the burden of proof on all issues, 28 C.F.R. § 48.10(a)(4) (1988), demonstrate that Congress intended to impose a rigorous test for papers seeking an antitrust exemption after 1970. Yet even the panel seemed to acknowledge that the Attorney General adopted an extremely expansive interpretation of the Act (Pet. App. 177a-78a, 180a, 182a, 200a), which, if

permitted to stand, will make it significantly easier for other newspapers to obtain JOAs in the future.

In her dissent from the denial of rehearing *en banc*, Chief Judge Wald emphasized that the Attorney General's decision depended completely on his prediction "that even in the absence of a JOA or any possibility thereof, the News will continue to price below costs, sustaining significant losses itself [in order to drive] the Free Press from Detroit." Pet. App. 205a. Yet, as she also observed, this prediction "makes no economic sense in light of the factual findings that [the Attorney General] himself accepted as true," particularly the finding that Detroit "can support *two profitable newspapers* if, in the words of Free Press management, 'competitive pricing becomes rational and consistent with other markets around the country.'" Pet. App. 205a, quoting Free Press management, cited in ALJ Recommended Decision at Pet. App. 96a (emphasis in original).

Not only is the Attorney General's interpretation of the NPA legally and factually insupportable, but it has profound implications for other newspapers. If left standing, it would permit any organization with adequate resources to sustain losses for several years to obtain approval of a JOA (and thereby gain monopoly profits) in any competitive market, even one that previously had two profitable newspapers. This could be accomplished by lowering circulation and advertising prices to incite a price war, as long as officials from the "non-failing" paper were willing to testify that they will not raise prices even if the JOA is denied.⁶

⁶The possibility of a newspaper being forced into a JOA is not idle speculation. As described in the *amicus curiae* brief filed in the court of appeals by Little Rock Newspapers, Inc. (publisher of the *Arkansas Democrat*), Gannett, the owner of The Detroit News, has cut prices and thereby transformed the *Arkansas Gazette*, which it also owns and which competes with the *Democrat*, from a profitable newspaper into one that is losing

Such a strategy would cause the second newspaper to lower its prices in order to maintain circulation and advertising. Under the Attorney General's interpretation of the NPA, the second newspaper would then be "failing" because it would be losing money and would have no unilateral way out of its loss position. Attorney General's Decision and Order at Pet. App. 141a, 142a-44a; Panel Opinion at Pet. App. 176a, 177a, 184a-86a.

The only requirement that would be the least bit difficult to satisfy would be demonstrating that the "non-failing" paper would maintain its low prices, and continue to lose money, even if the JOA were denied. However, under the Attorney General's decision, the applicants could meet their burden of proof on this issue through testimony of officials from the "non-failing" paper. Pet. App. 144a-76a. Ultimately, of course, both newspapers would have to agree to operate under a JOA, but they would have an enormous financial incentive to do so, since, in Judge Ginsburg's words, a JOA is a "large pot of gold," which offers profits that far exceed those that either paper could make in a competitive market. Pet. App. 195a.

Under this approach, it was irrelevant to the panel and to the Attorney General that neither the News nor the Free Press was dominant, and that the Free Press was not in a "downward spiral," in which a newspaper's decline in circulation and advertising feed each other, eventually becoming irreversible, and causing the paper to fail. That pattern had been found in every other JOA approved by the Department of Justice, and, as even

approximately \$10 million per year, the same amount that the "failing" Free Press is losing here. On August 14, 1988, six days after the Attorney General approved the Detroit JOA, but before this case had been filed, Gannett increased the pressure on the *Democrat* by further cutting the *Gazette's* circulation price, this time by 57.5%. *Amicus Curiae* Brief at Add. 2-3.

the Attorney General acknowledged here, dominance and downward spiral were "the 'frame of reference [Congress] essentially embraced'" in adopting the NPA. Dissent from Panel Opinion at Pet. App. 197a (brackets in original), *quoting* Attorney General's Decision at Pet. App. 146a. Instead, the Attorney General interpreted the "probable danger of financial standard" so loosely that it is indistinguishable from the not "likely to remain or become financially sound" standard that Congress intended to limit to JOAs that were in existence when it adopted the NPA. Dissent from Panel Opinion at 194a-95a.

As Chief Judge Wald pointed out, the Attorney General's finding that the News is not likely to raise its prices even if the JOA is denied amounts to a finding that the News will engage in predatory pricing, which runs counter to "[c]lassic economic principles and basic antitrust law." Pet. App. 207a-208a, *citing Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("predatory pricing schemes are rarely tried, and even more rarely successful"). This finding also highlights the expansive nature of the Attorney General's construction of the NPA, particularly since his interpretation would reward them with a JOA for conduct that the Act itself excludes from the exemption. 15 U.S.C. § 1803(c) (Act not to "be construed to exempt from any antitrust law any predatory pricing").

In his memorandum in opposition to petitioners' motion for a stay, Attorney General Thornburgh argued (at 2-3) that petitioners have overstated the ease with which future applicants may obtain a JOA, claiming that Attorney General Meese in fact gave weight to eight different considerations in approving the JOA at issue here. However, five of the factors cited in the opposition (nos. 1, 2, 3, 4 and 7) are all variations on the contentions that the Free Press has sustained losses for many years, that the Free Press could not raise its prices unless the News did the same, and that the papers have been competing for a number of years. All

these factors are subsumed within petitioners' central argument that, under the Attorney General's decision, a newspaper may obtain a JOA simply by demonstrating that it has sustained several years of losses and that it cannot unilaterally raise its prices. *See supra* pp. 6-7, 9-11, 12, 20-22.

The Attorney General also argued (no. 5) that the News "enjoys a significant competitive advantage in advertising and circulation," although he did not reconcile this assertion with the panel majority's finding that the daily circulation of the two papers was within one percentage point. Pet. App. 140a; *see supra* p. 6. The findings of both the Antitrust Division and the ALJ (which the Attorney General adopted in full) demonstrate that, even taking the News's advantages into account, the two papers were essentially competitive equals. In other words, the News's lead in advertising and its slight lead in circulation may not be viewed in isolation, but instead must be evaluated in the context of the Free Press's advantages, including its dominance in the critical morning market. *See supra* pp. 6-7.

The Attorney General's sixth and eighth arguments are that it is relevant that "the corporate parent of *The Detroit Free Press* will close the newspaper if a JOA is denied" and that "neither improper marketing practices nor mismanagement caused the poor financial condition of *The Detroit Free Press*." Opposition, p. 2. Respondent overstates his sixth argument since Attorney General Meese only said that this self-serving testimony from the Chief Executive Officer of Knight-Ridder could not be "wholly disregarded," while the ALJ found that it was not credible. Pet. App. 104a-105a, 144a; *see supra* p. 8. Although a finding of improper marketing practices or mismanagement might have been a sufficient basis for denying the application, their absence certainly is not a justification for granting it.

Finally, in an effort to defend his construction of the NPA against the charge that it will provide profitable papers with a guide to obtaining a JOA, the Attorney General argued that he would have the authority to disapprove a JOA application where

the "newspapers had deliberately created losses as a means of obtaining a JOA." Opposition, p. 3. The problem with this limitation is that it is highly improbable that a JOA will ever be the *exclusive* goal of competing newspapers. Instead, as even the panel majority recognized, the concern about the Attorney General's interpretation of the NPA is that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be *assured* a soft landing," namely a JOA. Pet. App. 189a (emphasis added).

* * *

Although Congress adopted the NPA in order to preserve as many "editorially and reportorially independent and competitive" newspapers as possible, 15 U.S.C. § 1801, the Attorney General's decision "will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Dissent from Denial of Rehearing *En Banc* at Pet. App. 210a (emphasis in original). Thus, the "giant stride the Attorney General has taken" (Pet. App. 197a) is a guide to any deep-pocket organization seeking monopoly profits in the newspaper business and will jeopardize independent newspapers in 25 cities.

The Newspaper Preservation Act is an important statute which this Court has not previously interpreted. No case is likely to present the issues more sharply than they are presented here, and the decision below is likely to be interpreted as definitive unless this Court accepts review. In Judge Ginsburg's words, this is "an important and unprecedented case" (Pet. App. 191a), and it raises issues of exceptional importance warranting the issuance of a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

April 5, 1989

88-1640 (2)

FILED

APR 5 1988

JOSEPH P. SPANIO, JR.
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

**MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, et al.,**

Petitioners,

v.

**RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.,**
Respondents.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
Recommended Decision of the Administrative Law Judge (December 29, 1987)	1a
Decision and Order of the Attorney General (August 8, 1988)	136a
Memorandum Opinion and Order of the U.S. District Court for the District of Columbia (September 14, 1988)	149a
Judgment of the U.S. Court of Appeals for the District of Columbia Circuit (January 27, 1989)	164a
Opinions (Panel Majority and Dissenting) of the U.S. Court of Appeals for the District of Columbia Circuit (January 27, 1989)	166a
Order and Opinions (Concurring and Dissenting) of the U.S. Court of Appeals for the District of Columbia Denying Suggestion for Rehearing En Banc (February 24, 1989)	198a

**BEFORE THE
ATTORNEY GENERAL OF THE UNITED STATES**

In the Matter of:

Application by Detroit Free Press)	Docket No.
Incorporated, and The Detroit News,)	44-03-24-8
Inc., for Approval of a Joint)	
Newspaper Operating Arrangement)	[December
Pursuant to the Newspaper)	29, 1987]
Preservation Act, 15 U.S.C.)	
§ § 1801, <i>et seq.</i>)	
)	

RECOMMENDED DECISION

By Morton Needelman, Administrative Law Judge

Seymour H. Dussman, Gregory B. Hovendon, and Marybeth McGee,
Counsel for Antitrust Division,
United States Department of Justice

Hughes Hubbard & Reed Washington, D.C.
By Philip A. Lacovara, Calvin J. Collier, and Gerald Goldman
Counsel for Detroit Free Press, Incorporated

Nixon, Hargrave, Devans & Doyle Washington, D.C.
By John Stuart Smith, and Robert C. Bernius Lawrence J.
Aldrich Arlington, Virginia
Counsel for The Detroit News, Inc.

Barris, Sott, Denn & Driker
Detroit, Michigan

By Eugene Driker, Andrew M. Zack, and Morley Witus
Counsel for Intervenors Newspaper Drivers and Handlers
Local No. 372, and Detroit Mailers Union No. 40, each af-
filiated with International Brotherhood of Teamsters

Miller, Cohen, Martens & Ice Southfield, Michigan
By Duane F. Ice, Russell S. Linçen, and Hanan B. Kolko
Counsel for Intervenor Newspaper Guild of Detroit, Local 22,
AFL-CIO

Bell & Gardner, P.C. Detroit, Michigan
By Edward F. Bell, Cynthia K. Yott, and George Koklanaris
Counsel for Intervenors Coleman A. Young, Mayor of the
City of Detroit, and the City of Detroit

CONTENTS

	<u>Page</u>
I. STATEMENT OF THE PROCEEDINGS	1 [1a]
II. FINDINGS OF FACT	8 [6a]
A. The Great Detroit Newspaper War	8 [6a]
1. The Rivals	8 [6a]
2. The Setting	11 [9a]
3. The History	16 [15a]
4. The Status of the Rivalry At The Time of the JOA Application	35 [31a]
a. Overview	35 [31a]
b. Circulation	42 [39a]
c. Circulation and Advertising Revenues	54 [58a]
d. Linage	56 [59a]
e. Financial Condition of the Free Press	62 [70a]
f. Financial Condition of the News	71 [82a]
B. The Prospects For The Free Press	73 [86a]
1. The Detroit Economy	73 [86a]
2. Increased Revenue	75 [87a]
3. Lower Costs	90 [100a]
4. Other Strategies	92 [102a]
5. Some Predictions	93 [104a]
a. Chapman	93 [104a]
b. Rosse	95 [105a]
c. Morton	102 [111a]
d. Baseman	104 [113a]

C. The Terms of the JOA	106	[114a]
III. DISCUSSION	110	[117a]
IV. CONCLUSIONS	128	[132a]
V. RECOMMENDED ORDER	129	[133a]

TABLES

		<u>Page</u>
Table 1: Wayne County Demographics (1960-1985)	11	[10a]
Table 2: Oakland County Demographics (1960-1985)	13	[11a]
Table 3: Macomb County Demographics (1960-1985)	13	[12a]
Table 4: Total of Wayne, Oakland And Macomb Demographics (1960-1985)	14	[13a]
Table 5: Combined Free Press And News Sunday Circulation (1960-1987) And Free Press Share	44	[41a]
Table 6: Combined Free Press And News Sunday Circulation (1960-1987) And Free Press Share	46	[43a]
Table 7: Combined Free Press And News Daily Circulation (1960-1987) In PMA Counties And Free Press Share,	48	[46a]
Table 8: Combined Free Press And News Sunday Circulation (1960-1987) In PMA Counties And Free Press Share	49	[48a]

Table 9: Combined Free Press And News Daily Circulation (1960-1987) In The CZ And RTZ And Free Press Share	50	[50a]
Table 10: Combined Free Press And News Sunday Circulation (1960-1987) In The CZ And RTZ And Free Press Share	51	[52a]
Table 11: Combined Free Press And News Home Delivery Circulation (1960-1987) In CZ And RTZ And Free Press Share	53	[56a]
Table 12: Combined Free Press And News Circulation Revenue (1963-1986) And Free Press Share	55	[60a]
Table 13: Combined Free Press And News Advertising Revenue (1963-1986) And Free Press Share	56	[61a]
Table 14: Combined Free Press And News Total Full-Run Advertising Linage (1960-1986) And Free Press Share	57	[62a]
Table 15: Combined Free Press And News Full-Run ROP Advertising Linage (1960-1986) And Free Press Share	58	[64a]
Table 16: Combined Free Press And News Full-Run ROP Classified Linage (1960-1986) And Free Press Share	60	[68a]
Table 17: Combined Free Press And News Full-Run ROP Classified Linage (1960-1986) and Free Press Share	61	[72a]
Table 18: Combined Free Press And News Full-Run ROP General Linage (1960-1986) And Free Press Share	62	[74a]
Table 19: Free Press Selected Financial Information (1963-1986)	63	[76a]

Table 20: News Selected Financial Information (1963-1986)	71 [84a]
--	----------

I

STATEMENT OF THE PROCEEDINGS

On May 9, 1986, the *Detroit Free Press* ("Free Press"), which is published by Detroit Free Press, Incorporated, a wholly owned subsidiary of Knight-Ridder, Inc., and *The Detroit News* ("News"), which is published by The Detroit News, Inc., a wholly-owned subsidiary of Gannett Co., Inc., filed an application for approval of a joint operating arrangement ("JOA"). The proposed JOA would effectively merge the commercial (i.e., non-reportorial and non-editorial) aspects of the only metropolitan daily newspapers serving Detroit, Michigan, and thus end the protracted and bitterly contested Detroit newspaper war.

The application and data supporting the JOA were filed pursuant to the Newspaper Preservation Act ("NPA") which grants a limited antitrust exemption for a JOA receiving the prior written consent of the Attorney General. To qualify for approval, it must be demonstrated to the satisfaction of the Attorney General that one of the parties to the proposed JOA is a "failing newspaper", defined as "a newspaper publication which, regardless of ownership or affiliation, is in probable danger of financial failure." In addition, the Attorney General must determine that approval "would effectuate the policy and purpose" of NPA which is to maintain "a newspaper press editorially and reportorially independent and competitive in all parts of the United States."

In order to determine whether the Free Press meets the crucial "failing newspaper" standard of NPA, and thus is entitled to enter into the proposed agreement with the News, on February 25, 1987, the Attorney General ordered that an Administrative Law Judge conduct a hearing in accordance with the Department of Justice's NPA Regulations, 28 C.F.R. §

48.10. This order, which came after a period of public comment on the proposed JOA and recommendations of the Acting Assistant Attorney General for the Antitrust Division, directed that a record be developed in the following seven areas bearing on the "failing newspaper" question:

1. The relevance in the Detroit newspaper market of economies of scale, and the extent to which the two newspapers' unit costs differ.
2. The possibility of geographic, demographic or other segmentation of the Detroit newspaper market, and its implications for the viability of two competing newspapers.
3. The reliability, as an indicator of the viability of competing newspapers in Detroit, of the recent financial performance of the *Detroit Free Press* and *The Detroit News*, in light of the economic recession and the possibility that one or both of the newspapers may have been seeking market dominance rather than near-term profitability.
4. The financial history of the *Detroit Free Press* as a separate economic unit, considering specifically capital structure, taxes and management fees.
5. The cause of *The Detroit News*' losses in 1986 after a profitable 1985.
6. The proper characterization of expenses incurred by the *Detroit Free Press* in its effort to achieve market dominance, specifically whether any of those expenditures are properly regarded as capital investments, and the proper amortization period of the *Detroit Free Press*' investment in its Riverfront plant.
7. The *Detroit Free Press*' prospects for long-term profitability in the Detroit newspaper market in light

of (a) favorable advertiser, demographic and subscriber trends, (b) the possibility of significant cost savings, and (c) the possibility of a price increase.

Following designation by the Attorney General of the major Detroit area newspaper unions and the Honorable Coleman A. Young, Mayor of Detroit, as Intervenor with party status, a prehearing conference was held in Detroit on April 9, 1987. At that time and subsequently through the use of telephonic prehearing conferences, a schedule was set, discovery problems were resolved,¹ and two basic ground rules for the formal hearings were established: intervenor representation was to be coordinated; and all parties — Applicants, Antitrust Division, and Intervenor — were required to present the direct testimony of their witnesses in writing in advance of the formal hearings, the hearings being reserved essentially for cross-examination and a hybrid form of redirect that allowed for the introduction of evidence rebutting the previously filed written direct testimony of opposition witnesses.

On July 17, 1987, objections to proposed exhibits (including written direct testimony) were heard. The witnesses were then presented for cross-examination and rebuttal in Detroit between August 3 and August 24 when the record was closed for the receipt of evidence. During these hearings counsel for all parties were given full opportunity to be heard and to

¹In addition to the use of telephonic prehearing conferences, the discovery stage (document production, written interrogatories, witness interviews and depositions) was somewhat shortened by moving the massive pre-hearing public record (including virtually all documents filed by the newspapers with the Attorney General in support of the application) to Detroit for easier intervenor access. The entry of a strict protective order was designed to discourage time-consuming confidentiality arguments and appeals to the Assistant Attorney General, who had been designated as the reviewing authority for all procedural matters.

examine the witnesses. The parties filed their proposed findings and main briefs on September 23, 1987. Replies were filed on October 14, 1987.

After reviewing all the evidence as well as the proposed findings, conclusions, and briefs submitted by the parties, and based on the entire hearing record including a determination of the credibility of witnesses (which took into account demeanor and the consistency between prepared for litigation testimony, expert or otherwise, and the plain meaning of everyday business records written before the JOA application was filed) I make the following findings of fact:²

²Proposed findings not adopted in the form or substance proposed are rejected as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

NX (Applicant newspapers' exhibits)
AX (Antitrust Division's exhibits)
IX (Intervenors' exhibits)

At the ALJ's direction the parties prepared Joint Exhibits (JX1-JX27) outlining the basic business and financial facts respecting the two newspapers. These JX's are the sources for the tables appearing in the Findings of Fact. Indices to the parties' exhibits were marked as Administrative Law Judge Exhibits (ALJ Exhibits 1-3) and appear as the first exhibit in Volume I of each party's bound volumes of exhibits.

The direct testimony, which was submitted in written form prior to the start of the formal hearings in Detroit, is cited by the exhibit number followed by a paragraph (§) reference and witness's name as in NX 800Z-30 § 96 (Rosse). Testimony on cross-examination or in rebuttal is cited by the witness's name followed by the transcript page as in Rosse 2452. Bound, bulky, and paginated exhibits were marked with letters as physical exhibits followed either by a page reference as in AX A p. K001791 or by reference to some document included within the physical exhibit as in NX C-2 Ex. 1 § 4.2.

Applicants requested in camera treatment for a limited number of exhibits and after an adequate justification was made pursuant to the Federal Rules of Civil Procedure, it was ordered that these exhibits were to be segregated and placed in an in camera file. The Omnibus In Camera Order

(²footnote continued from previous page)
issued on July 21, 1987, which governs all in camera exhibits, provides in part as follows:

It should be clearly understood that nothing contained in this Order in any way limits the public use of this material in decisions written by the Administrative Law Judge, the Attorney General, or reviewing courts. While I have no intention of making unnecessary disclosures, whether or not to publish in my Recommended Decision all or part of the material contained in in camera exhibits must be left solely to the discretion of the Administrative Law Judge, and I must reserve the right to exercise this discretion without consulting any party.

The appearances of the witnesses were as follows:

Name	Called By	Exhibit No. For Direct Testimony	Transcript for Cross, Redirect, and Rebuttal Testimony
Robert H. Thibault Partner, accounting firm of Ernst & Whinney	Applicants	NX 500	257-555
Stewart J. Hahn, Partner, accounting firm of Arthur Andersen & Co.	Applicants	NX 600	637-902
Robert J. Hall, Ex. V.P. and General Manager, Free Press	Applicants	NX 200	920-1344
Peter B. Clark, Formerly, Chairman, Evening News Association, now, a board member of Gannett	Applicants	NX 400	1352-1519
Allen H. Neuharth, CEO and Chairman, Gannett	Applicants	NX 300	1519-1761
Alvah H. Chapman, CEO and Chairman, Knight-Ridder	Applicants	NX 100	1762-2154
John E. Morton, Retained expert	Applicants	NX 700	2156-2372

II. FINDINGS OF FACT

A. The Great Detroit Newspaper War

1. The Rivals

1. This JOA application represents the largest proposed consolidation considered to date under the Newspaper Preser-

(²footnote continued from previous page)

James N. Rosse, Retained expert	Applicants	NX 800	2379-2819
David N. Lawrence, Jr., Publisher, Free Press	Antitrust Division	Mr. Lawrence, an adverse witness, did not file written direct.	2820-3049
John E. Kwoka, Jr., Retained expert	Antitrust Division	AX 200	3050-3140
Kenneth C. Baseman, Retained expert	Antitrust Division	AX 300	3141-3207
Marilyn J. Simon, Expert on the staff Divi- sion of Antitrust Division	Antitrust	AX 100	3210-3254
Dorn K. Dean, Retained expert	Intervenors	IX 450	3269-3321
Robert C. Nelson, Formerly, Publisher of the News, now, Special Assistant to the Chairman, Gannett	Intervenors	Mr. Nelson, an adverse witness, did not file written direct.	3339-3451
J. Chester Johnson, Retained expert	Intervenors	IX 405	3453-3524
Coleman A. Young, Mayor of Detroit	Intervenors	IX 400	By stipulation part of Mayor Young's pre- hearing deposition, NX 860 was received into evidence in lieu of cross-examination.

vation Act.³ In the News and Free Press it would bring together, respectively, the nation's seventh and eighth largest daily and the seventh and ninth largest Sunday newspapers. The corporate parents of the papers are the two largest news organizations in the United States.⁴

2. The alleged "failing newspaper," the Free Press, is a morning metropolitan daily of general interest serving the Detroit, Michigan area. It began publishing once a week in 1831 under the banner of the *Democratic Free Press and Michigan Intelligencer*. By 1835, the paper was being published six days a week and a Sunday edition was added in 1853. In 1940, John S. Knight purchased the Free Press for \$3.2 million, and it became part of the newspaper group owned by Knight Newspapers. When Knight Newspapers merged with Ridder Publication in 1974, Detroit Free Press, Incorporated, became a wholly-owned subsidiary of Knight-Ridder, Inc.⁵

3. Knight-Ridder, Inc. ("Knight-Ridder"), which has its corporate headquarters in Miami, Florida, is the nation's second largest newspaper group with company-wide total daily paid circulation exceeding 3.7 million. It reported operating revenues of over \$1.9 billion in 1986 and net income of over \$140 million. About 90% of Knight-Ridder's revenues are derived from its 31 daily newspapers which include *The Miami Herald*, *Detroit Free Press*, and Philadelphia's only metropolitan papers, *The Philadelphia Inquirer* and *Philadelphia Daily News*. In ad-

³ The circulation of the Free Press and News exceeds the combined circulation of all other papers which have previously applied for advance JOA approval. IX 450F ¶ 18 (Dean), IX 452. By the same token, the losses of the Free Press and News far exceed the combined losses of all prior JOA applicants. NX C-1, p. 12, Appendix I, pp. 43-44.

⁴ NX A, pp. 4-5, 62, NX 300C ¶ 10 (Neuharth); AX 2A-E.

⁵ NX A, pp. 2, 62, NX C-1, Appendix I, p. 2, NX 100A-B ¶¶ 2, 5 (Chapman); IX 225E.

dition to newspapers, Knight-Ridder has magazine and broadcasting interests.⁶

4. Joining with the Free Press in the JOA application is the News, the only other metropolitan daily of general interest serving Detroit. The News was first published as *The Evening News* in 1873 by James E. Scripps who created the Evening News Association ("ENA") as the privately-held corporate parent for the News and other media properties. In 1960, ENA purchased from the Hearst chain the assets of the *Detroit Times*, at that time Detroit's third general interest daily newspaper. In addition to the News, ENA owned newspapers in New Jersey and California, a radio station in Detroit, and five television stations including the CBS affiliate (Channel 9) in Washington, D.C. In August 1985, Gannett co., Inc. contracted to buy ENA for \$717 million. The sale was consummated on February 18, 1986.⁷

5. Gannett Co., Inc. ("Gannett"), which has its corporate headquarters in Arlington, Virginia, reported operating revenues exceeding \$2.8 billion in 1986 and net income of over \$276 million. It publishes 93 daily newspapers including the domestic and international editions of *USA Today* as well as 39 nondailies. In all, its newspapers have a total paid circulation of more than 6.1 million, making Gannett the largest newspaper group in the United States. In addition to newspapers, Gannett owns eight television stations (including Channel 9, Washington, D.C., renamed "WUSA-TV" after the acquisition of ENA), 18 radio stations, and the nation's largest outdoor advertising company. Among its larger daily

⁶Chapman 1985; NX A, pp. 2, 4-5, 44 NX C-1, Appendix I, pp. 1-2, NX 100B-C ¶ 7 (Chapman).

⁷NX C-1, Appendix I, p. 3 NX 400A-B, D, E, S ¶¶ 1-2, 4, 9, 42 (Clark); IX 255 F. Of the \$717 million paid for ENA, Gannett has attributed \$150 million to the value of the News. Neuharth 162728.

newspapers are *The Detroit News*, *The Des Moines Register*, *The Louisville CourierJournal*, *The Cincinnati Enquirer*, *Honolulu Star-Bulletin*, *The Nashville Tennessean*, and *Arkansas Gazette*. Gannett also publishes *USA Weekend*, a weekend supplement carried in approximately 280 newspapers with a combined circulation of over 13.7 million. Gannett owns Louis Harris & Associates, an international research company, and it operates a television programming production company called GTG Entertainment.⁸

2. The Setting

6. Detroit, a great metropolitan center and the sixth largest city in the United States,⁹ has seen better days as shown in Table 1, the demographics for Wayne, Detroit's home county.

7. The decline in Detroit's population since 1960 traces to several economic and social forces, but there is no dispute that the race-related riots which erupted in 1967 were a significant cause of an exodus from the city's center.¹⁰ Also, as indicated in Finding 11, Detroit lost ground (and population) in the severe 1979-1984 depression that hit the automobile industry.

8. The most recent census figures for the period ending June 1987 suggest, however, that Detroit's six-year population decline may have been arrested.¹¹

⁸NX A, p. 4, NX B, p. 37, NX 300C-D ¶ 10 (Neuharth).

⁹Detroit is by far the largest market in which advance approval for a JOA has been sought under NPA. Detroit is about three times larger than Seattle or Cincinnati, 10 times larger than Chattanooga, and 25 times larger than Anchorage. IX 450F ¶ 19 (Dean), IX 453.

¹⁰Nelson 3420-21; NX 400E ¶ 13 (Clark).

¹¹IX 391.

**Table 1: Wayne County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	2,678.9	774.9	3,572,560	4,027,689	88.7
1961	2,703.7	792.4	3,412,582	3,808,685	89.6
1962	2,716.1	794.8	3,669,231	4,049,924	90.6
1963	2,717.1	794.3	3,869,679	4,219,933	91.7
1964	2,708.5	791.8	4,005,547	4,311,676	92.9
1965	2,710.0	794.7	4,603,010	4,870,910	94.5
1966	2,705.6	794.2	4,759,520	4,896,626	97.2
1967	2,713.8	799.5	4,667,484	4,667,484	100.0
1968	2,727.3	812.8	5,005,881	4,804,108	104.2
1969	2,723.3	821.0	4,878,195	4,442,801	109.8
1970	2,701.7	844.3	4,812,867	4,138,321	116.3
1971	2,708.8	848.8	5,178,730	4,269,357	121.3
1972	2,716.9	882.0	5,437,567	4,339,638	125.3
1973	2,637.5	870.5	5,891,881	4,426,657	133.1
1974	2,567.7	858.8	6,529,683	4,420,909	147.7
1975	2,526.0	850.8	6,843,574	4,245,393	161.2
1976	2,490.8	857.8	7,775,192	4,560,230	170.5
1977	2,445.8	851.6	7,776,341	4,284,485	181.5
1978	2,405.0	842.1	9,578,507	4,901,999	195.4
1979	2,359.1	833.0	10,009,791	4,604,320	217.4
1980	2,310.4	822.2	10,009,293	4,055,629	246.8
1981	2,272.7	816.1	10,764,482	3,951,719	272.4
1982	2,231.5	803.5	10,331,026	3,573,513	289.1
1983	2,177.6	793.8	10,272,548	3,442,543	298.4
1984	2,178.4	804.6	10,072,940	3,237,846	311.1
1985	2,171.4	804.1	11,250,997	3,491,930	322.2

Source: JX 10.

9. In the larger battlefield of the Detroit newspaper war, the so-called "PMA" (the papers' "Primary Marketing Area"), Wayne's neighboring counties of Macomb and Oakland are growing.¹² But notwithstanding this growth, the overall PMA population reached its peak in 1972, and has declined slightly since then as seen in Tables 2-4.

¹²IX 277B.**Table 2: Oakland County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	733.8	210.2	988,927	1,114,912	88.7
1961	746.5	204.2	962,709	1,074,452	89.6
1962	757.9	207.4	1,068,832	1,179,726	90.6
1963	750.0	205.2	1,179,309	1,286,051	91.7
1964	758.7	207.7	1,224,822	1,318,431	92.9
1965	765.0	210.2	1,402,782	1,484,425	94.5
1966	780.8	215.9	1,528,795	1,572,834	97.2
1967	821.6	228.0	1,623,791	1,623,791	100.0
1968	851.2	239.3	1,830,167	1,756,398	104.2
1969	863.1	245.7	1,822,215	1,659,577	109.8
1970	912.8	267.5	1,858,212	1,597,775	116.3
1971	916.1	269.2	2,199,490	1,813,265	121.3
1972	923.9	281.3	2,455,975	1,960,076	125.3
1973	933.5	289.0	2,903,357	2,181,335	133.1
1974	952.3	298.5	3,190,423	2,160,070	147.7
1975	965.4	304.8	3,341,897	2,073,137	161.2
1976	970.7	313.4	3,719,645	2,181,610	170.5
1977	973.6	317.8	3,869,164	2,131,771	181.5
1978	992.8	324.1	4,798,909	2,455,941	195.4
1979	1,010.5	331.0	5,894,176	2,711,213	217.4
1980	1,019.5	363.2	5,976,644	2,421,655	246.8
1981	1,026.4	371.1	6,445,016	2,366,012	272.4
1982	1,023.1	372.7	6,588,580	2,278,997	289.1
1983	1,014.0	368.6	6,647,396	2,227,680	298.4
1984	1,021.7	376.3	7,535,089	2,422,079	311.1
1985	1,029.1	380.2	8,481,600	2,632,402	322.2

Source: JX 9.

**Table 3: Macomb County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	437.7	120.9	418,149	471,419	88.7
1961	436.6	114.6	403,697	450,555	89.6
1962	452.7	119.0	484,353	534,606	90.6
1963	476.9	125.3	554,397	604,577	91.7
1964	502.7	132.2	610,498	657,156	92.9
1965	521.9	137.8	716,122	757,801	94.5
1966	554.1	147.6	785,512	808,140	97.2
1967	578.4	154.8	816,001	816,001	100.0
1968	596.3	161.6	915,341	878,446	104.2
1969	629.9	172.9	1,059,470	964,909	109.8
1970	627.0	172.7	1,032,524	887,811	116.3
1971	631.3	174.4	1,196,293	986,227	121.3
1972	637.9	182.6	1,354,939	1,081,356	125.3
1973	647.8	188.9	1,601,085	1,202,919	133.1
1974	651.9	192.3	1,729,688	1,171,082	147.7
1975	669.3	198.8	1,799,830	1,116,520	161.2
1976	672.2	204.2	2,018,650	1,183,959	170.5
1977	676.7	207.8	2,045,319	1,126,898	181.5
1978	695.4	216.8	2,429,736	1,243,468	195.4
1979	702.4	222.8	3,664,670	1,685,681	217.4
1980	699.1	235.0	3,685,942	1,493,494	246.8
1981	705.0	240.7	4,001,227	1,468,879	272.4
1982	701.7	241.8	4,090,604	1,414,944	289.1
1983	697.7	239.9	4,122,409	1,381,504	298.4
1984	699.2	243.7	4,302,197	1,382,898	311.1
1985	699.6	244.5	4,829,219	1,498,827	322.2

Source: JX 8.

**Table 4: Total of Wayne, Oakland
and Macomb Demographics (1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	3,850.4	1,106.0	4,979,636	5,614,020	88.7
1961	3,886.8	1,111.2	4,778,988	5,333,692	89.6
1962	3,926.7	1,121.2	5,222,416	5,764,256	90.6
1963	3,944.0	1,124.8	5,603,385	6,110,562	91.7
1964	3,969.9	1,131.7	5,840,867	6,287,263	92.9
1965	3,996.9	1,142.7	6,721,914	7,113,137	94.5
1966	4,040.5	1,157.7	7,073,827	7,277,600	97.2
1967	4,113.8	1,182.3	7,107,276	7,107,276	100.0
1968	4,174.8	1,213.7	7,751,389	7,438,953	104.2
1969	4,216.3	1,239.6	7,759,880	7,067,286	109.8
1970	4,241.5	1,284.5	7,703,603	6,623,906	116.3
1971	4,256.2	1,292.4	8,574,513	7,068,848	121.3
1972	4,278.7	1,345.9	9,248,481	7,381,070	125.3
1973	4,218.8	1,348.4	10,396,323	7,810,911	133.1
1974	4,171.9	1,349.6	11,449,794	7,752,061	147.7
1975	4,160.7	1,354.4	11,985,301	7,435,050	161.2
1976	4,133.7	1,375.4	13,513,487	7,925,799	170.5
1977	4,096.1	1,377.2	13,690,824	7,543,154	181.5
1978	4,093.2	1,383.0	16,807,152	8,601,408	195.4
1979	4,072.0	1,386.8	19,568,637	9,001,213	217.4
1980	4,029.0	1,420.4	19,671,879	7,970,778	246.8
1981	4,004.1	1,427.9	21,210,725	7,786,610	272.4
1982	3,956.3	1,418.0	21,010,210	7,267,454	289.1
1983	3,889.3	1,402.3	21,042,353	7,051,727	298.4
1984	3,899.3	1,424.6	21,910,226	7,042,824	311.1
1985	3,900.1	1,428.8	24,561,816	7,623,158	322.2

Source: JX 11.

10. If the newspaper's PMA is expanded by adding nearby (and relatively small) Lapeer, Livingston, Monroe, and St. Clair counties in order to conform to the more widely-used non-newspaper measure, Primarily Metropolitan Statistical Area or "PMSA",¹³ the importance of the Detroit market becomes

¹³NX C-1, Appendix I, p. 22. "PMSA" has apparently replaced SMSA (Standard Metropolitan Statistical Area) which in the Detroit area consists of Lapeer, Livingston, Macomb, Oakland, St. Clair, and Wayne counties. NX C-5 ¶ 1B.

readily apparent. In 1986, the Detroit PMSA ranked fifth in the nation in both population (4,361,000) and number of households (1,576,700). The Detroit PMSA also ranked second nationally in suburban population (those persons living outside the limits of the city center), trailing only the Los Angeles-Long Beach metropolitan area. Detroit ranks sixth in buying income, eighth in households with income over \$50,000, and sixth in total retail sales.¹⁴

11. Historically, the economy of the densely-populated Detroit metropolitan area has been subject to the vagaries of the highly cyclical automobile industry, which suffered a severe depression in 1979. The depression (brought on by a combination of high interest rates, real decline in purchasing power, and foreign competition) was both deeper and longer than the recession that hit most other areas of the country. The number of employees in the Detroit area declined as automobile workers pulled up stakes and looked elsewhere for work. Personal income and retail sales also declined and business failure increased.¹⁵

12. The effects of the 1979-1984 depression on both the Free Press and News were severe since a newspaper's circulation and advertising revenue tend to reflect the size of the underlying market and the level of its economic activity.¹⁶ Local businesses cut back on advertising lineage to the point that multiple listings were discontinued, and even in the one chosen paper, a smaller amount was spent on advertising.¹⁷

¹⁴NX 203H; AX 1A-1''0'', AX 504C.

¹⁵Clark 1487-90, Rosse 2687, 2709, Dean 3312; NX C-1, p. 11, Appendix I, pp. 23-25, NX D, p. F75275, NX 400H-''I'' ¶¶ 18, 19 (Clark), NX 800 Z-23 to Z-24 ¶ 82 (Rosse), NX 852B.

¹⁶Clark 1487-90, Rosse 2674-75, 2704, Nelson 3374-75; IX 4E.

¹⁷NX D, pp. F75266-73, NX 848C.

13. Despite urban riots, stagnant population growth, and uncertainty about the automotive industry, the Detroit newspaper market has always been regarded by the Free Press and News as a choice prize.¹⁸ Detroit is the nation's fourth largest market in terms of overall newspaper circulation, exceeded only by New York, Chicago, and Los Angeles. In addition, Detroit has the highest per capita newspaper readership in the United States, and it is first among the top ten markets in newspaper penetration of households.¹⁹

3. The History

14. The rivalry between the Free Press and the News over this huge Detroit newspaper market traces back into dim history.²⁰ The modern phase of the "Great Detroit Newspaper War"²¹ began in 1960 when the News bought the assets of the *Detroit Times* (principally its circulation lists) from Hearst. As a result of the acquisition, the News gained a substantial circulation lead over the Free Press.²²

15. The News's lead, however, was vulnerable to the Free Press's strategic positioning as the morning paper. Not only did the Free Press have a distributional edge (it is much easier to deliver a paper before the morning rush hour in contrast to the congestion problems faced by the afternoon paper) but the morning paper is also favored by white collar workers who have time to read before going off to work, and unlike the after-

¹⁸See Finding 98.

¹⁹AX 570Z-3; IX 22E, IX 373A, IX 462.

²⁰See IX 255E-U.

²¹IX 99C.

²²Clark 1446, 1499, Nelson 3340-41; NX 400E ¶ 12 (Clark), NX 702G, NX 852F; IX 26Z-76, IX 27A, IX 96A, IX 266C.

noon paper it does not face the stiff competition of television evening news programs.²³

16. External events also seemed to favor the Free Press. To illustrate, the 1967 riots had a greater impact on the News than the Free Press because the News's basic strength has always been in the city center itself.²⁴ Moreover, the 1968 strike against the two papers hurt the News more than the Free Press because the News was targeted by the unions as the main objective of the work stoppage. Most significantly, the early and mid-1970's brought life style and economic changes — inner city decay and flight to the suburbs, more women entering the job market, and the proliferation of white-collar service industry jobs — which favored the morning paper over its afternoon rival.²⁵

17. The News did not cravenly accept these reversals. In 1973, in what may have been the opening salvo of the latest and most bitter phase of the great Detroit newspaper war, the News built a plant in Sterling Heights, Michigan, which was specifically designed not only to facilitate delivery to its core readership in the central city, but also to challenge the Free Press's strength in servicing suburban and out-state readers removed from the central city area.²⁶

²³Morton 2191-92, 2274, Clark 1486-87; NX 400E ¶ 13 (Clark); IX 131E, IX 255K. The power of the morning franchise is such that under the proposed JOA, which requires the News to relinquish its minority share of the morning market (see Finding 137), the Free Press will become dominant in circulation. Clark 1477, Morton 2312-14; IX 251A-B, IX 265U.

²⁴Nelson 3417-18, 3420-22; IX 10C.

²⁵Clark 1485-86, 1514-15, Chapman 2086-87, Rosse 2505-06, 25992600; NX 400E ¶ 13 (Clark); IX 131E, IX 255L. Because of this trend, most of the major papers which have closed in the past 10 years have been afternoon papers. Chapman 1983-84.

²⁶Nelson 3355-58; NX 400F ¶ 14 (Clark); IX 255M.

18. The News made an even more direct challenge to the Free Press's main strength (its morning franchise) in 1976 when it began out-state home delivery and street sales of a morning edition.²⁷ At the the same time, the News made plans for the opening in late 1980 of a Lansing, Michigan satellite plant which would further challenge Free Press out-state and morning dominance with morning home delivery of an edition that went to press later than the Free Press's and thus contained more late-breaking news and final sports scores.²⁹

19. The ability of the Free Press to counteract these initiatives by moving aggressively against News strength in nearby circulation zones (the so-called "PMA", "CZ" and "RTZ") was limited by its lack of press capacity for producing post-midnight papers. To meet this need Knight-Ridder management in 1976 approved the construction of a new facility equipped with 36 offset presses. This facility (the Riverfront Plant) was designed to permit the Free Press to produce a larger number of late newspapers as well as providing superior color and graphics. The expenditure for Riverfront — \$47 million — was made for the specific purpose of taking the circulation lead away from the News.²⁹

20. Simultaneously with the opening of the Riverfront Plant in 1979, the Free Press signaled its intention of escalating the intensity of the growing war by adopting some of the tactics used successfully in Philadelphia where Knight-Ridder had scored a triumph (after six years of losses) for its papers (*The Inquirer* and *News*) over the rival *Bulletin*.³⁰ This new level

²⁷Clark 1355-56; NX C-1, Appendix I, p. 3, NX 400F ¶ 14 (Clark), NX 852F; IX 255M.

²⁸Clark 1357; NX C-1, appendix I, p. 3, NX 400F ¶ 14 (Clark), NX 852F; IX 342A-B.

²⁹NX C-1, appendix I, pp. 15-16, 50-51, NX C-3, Ex. 22.

³⁰Nelson 3372-74; AX 507B; IX 367A-B.

of competition first appeared in the form of sharp Free Press discounts in advertising rates,³¹ and the announcement of an aggressive circulation plan aimed at gaining 100,000 readers in five years.³²

21. These competitive moves by both papers came as the auto industry was going deeper into the depression begun in 1979, and the national economy entered a period of both recession and inflation which had a particularly severe impact on the cost of newsprint.³³ Revision of postal rates created still additional problems for the newspaper in the form of heightened direct mail competition.³⁴ In answer to these external pressures and the initiatives of the Free Press, the News put into effect steep circulation price cuts off its already low cover price and advertising discounts of its own in a determined effort to gain clear-cut market domination.³⁵

22. Responding to this challenge, Free Press management determined that it too would aim for domination at any cost by discounting advertising rates still further.³⁶ This strategy, which originated when operating losses were already apparent and Detroit was moving still deeper into an economic depression, represented an explicit rejection by the Free Press of

³¹Nelson 3372.

³²Nelson 3372; NX 852G; IX 35D.

³³Clark 1487-89, Chapman 1972-73, Rosse 2485, Nelson 3374-75; NX C-1, p. 14; IX 211A.

³⁴Rosse 2485-86; NX 700Z-15 ¶ 67 (Morton), NX 800Z-24 to Z-25 ¶ 83 (Rosse).

³⁵Clark 1383, 1394-96, 1436-37, 1467-68, Rosse 2445, Nelson 3368, 3373, 3409-10; NX D, p. 72374, NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 515B; IX 10C, IX 26C, IX 55A, IX 219, IX 255A-B, "O", IX 361.

³⁶Clark 1383, 1394-96, 1436-37, 1467-68, Rosse 2445, Nelson 3368, 3373, 3409-10; NX D, p. 72374, NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 515B; IX 10C, IX 26C, IX 55A, IX 219, IX 255A-B, "O", IX 361.

³⁷Lawrence 2898-99; NX 852B.

any thought of signaling the News "to cool it somewhat" until the "economy turns up."³⁷

23. Free Press and Knight-Ridder as well as News and ENA management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many union papers which had not been able to survive as the second paper in metropolitan area competition.³⁸

24. As the moves and countermoves described in Findings 20 to 22 were being made, the Free Press and Knight-Ridder also began to calculate the profits to be realized by a JOA as an alternative to the bitter fight for dominance which had developed.³⁹ To that end, peace initiatives in the form of feelers about the possibilities of a JOA were sent out by both Alvah Chapman, Knight-Ridder's CEO, and Peter Clark, ENA's CEO. These initiatives came at a time when the Free Press was completing its second year of operating losses and the News had just experienced its first.⁴⁰ At an early meeting between the two adversaries, it was emphasized that one or both newspapers needed to continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects for a JOA would be "ironclad".⁴¹

³⁷AX 507D; IX 20D. Once the struggle intensified, the Free Press seemed to be impervious to any attempts by the News either "to coach" it into returning to card rates by intermittent lulls in the severity of the discounts (Clark 1372-73; AX 546B) or to change its "style of competition" by a demonstration of the high cost of continued discounting. Clark 1398.

³⁸Clark 1399, 1502-03, Chapman 1854-55, 2141-42, Lawrence 2899-2900; NX 200M-N ¶ 30 (Hall).

³⁹Chapman 1854-59, 1862; NX 852J; AX 507A-C, AX 508A-D; IX 14A-C, IX 16A-C, IX 20A-D, IX 75A-"O".

⁴⁰Findings 83, 92; Clark 1377-82. See also Nelson 3391-93.

⁴¹IX 16B. See also Clark 1379-82, Chapman 2028-30.

25. Negotiations over a JOA continued sporadically during the period January 1981 to January 1984.⁴² Knight-Ridder representatives at first insisted that it must control and operate the JOA as well as receiving a near equal split of the profits.⁴³ ENA was not only unprepared to concede the control point, but it made counter-proposals for various profit splits in its favor.⁴⁴ The issue of how profits were to be split was never the subject of serious negotiation, however, because of the fundamental disagreement over the structure and control of the JOA.⁴⁵ Moreover, the imperfect knowledge each party had of the actual economic performance of the other was still another barrier to the success of these early JOA discussions. Neither Knight-Ridder nor ENA made public disclosure of financial information for its Detroit newspapers on a stand-alone basis. As it happens, during the late 1970's and early 1980's, officials of Knight-Ridder and the Free Press may have seriously overestimated the magnitude of the News's losses, incorrectly assuming them to be on the order of twice those of the Free Press. There is some evidence that this error, combined with the knowledge that Knight-Ridder's financial resources significantly exceeded those of ENA, encouraged the Free Press to spend extravagantly during the mid-1980's in the expectation that the News could ill-afford to meet the financial challenge and would either be driven from the field entirely, or would be forced to accept a JOA structured on

⁴²Clark 1376-82, Chapman 1878, Nelson 3391-3400; AX 7E-G; IX 66B, IX 349G-H.

⁴³AX 507A-D; IX 38B, IX 40A-B, IX 65A-C. See also Chapman 188485.

⁴⁴Clark 1479-81, Nelson 3398; IX 39A-B, IX 59A-B, IX 312B-F, IX 341B.

⁴⁵Clark 1493-94, Chapman 1885-86; NX 400Z-6 to Z-7 ¶ 71 (Clark); AX 515E.

terms favorable to Knight-Ridder.⁴⁶ Progress toward a JOA stalled, however, after Chapman proposed to end uncertainties concerning the actual financial circumstances of the two newspapers by permitting an independent auditor to examine their books. Clark declined the invitation because although he believed the News's financial position to be stronger than the Free Press's, he was unwilling to take the competitive risk of being proven wrong.⁴⁷

26. With the breakdown of the Knight-Ridder—ENA negotiations for a JOA, the Free Press (in concern with KnightRidder corporate executives) began in late 1983 and early 1984 to develop an even more aggressive and comprehensive long-range plan for achieving market domination called "Operation Tiger". The first phase of the plan, "Tiger I", was modeled after the Knight-Ridder "Win Plan" for Philadelphia. The planning for "Tiger I" was completed in May 1984, but the plan itself was not to be fully implemented before 1986.⁴⁸

27. The objectives of Tiger I were two-fold: to achieve profitability through total market dominance (in circulation, advertising, and news and editorial content),⁴⁹ and if that should fail, to force the News to accept a JOA on the free Press's terms.⁵⁰ While Tiger I was essentially a marketing strategy, other in-

⁴⁶See Lawrence 2909-10; AX 504E-F, AX 507A-D, AX 508A-D; IX 61A-B, IX 96A-B, IX 267-I, IX 315A-C, IX 503A-B. The Knight-Ridder strategy was described as "hurt[ing] the News financially [and] putting them in a position where they would have to accept an agency agreement [JOA] on our terms." AX 508A.

⁴⁷AX 515C; IX 70A-B, IX 71, IX 312B.

⁴⁸Chapman 1775-79; AX A, AX 501D, AX 515D; IX 92C-D, IX 96A-H, IX 99A to Z 146, IX 393A-B.

⁴⁹AX A, AX 501D; IX 96A-H, IX 99D, IX 161H, IX 275A.

⁵⁰Chapman 2140; AX 515A-F; IX 96A-H, IX 314A-B, IX 393A-B. Knight-Ridder had pursued similar objectives in Philadelphia with its "Win Plan". IX 364A to Z-41.

initiatives included obtaining the physical capacity for turning out more timely papers, and improving the editorial quality of the paper with an expanded sports coverage, stronger business coverage, new suburban and zoned city sections, and a better Sunday magazine.⁵¹

28. The cost of this overall plan for market domination was estimated at \$26.78 million.⁵² The plan assumed that because of these costs there would be losses in excess of \$27 million for the period 1984 to 1986.⁵³ Tiger I in fact had no specific target date for profitability.⁵⁴ As it happens, it soon became apparent to Free Press management that profitability was out of the question inasmuch as the main battlefield of the Detroit newspaper had become circulation and advertising discounting, which would hardly allow for any daily price increases that might have covered the additional expenses inherent in the Tiger plan itself and thus put the Free Press into the black.⁵⁵

⁵¹IX 99A to Z-146.

⁵²These costs were for improvements in news and editorial (\$7.25 million), promotion (\$4.57 million), production (\$7.59 million), and circulation (\$7.37 million). IX 99L.

⁵³Chapman 1778-79; NX 105; IX 99L. See also IX 394B.

⁵⁴Chapman 1778-89; IX 99G-H.

⁵⁵Clark 1394-95, Chapin 1776-77, 1866, 1951-55, Lawrence 2840, 2879-80, 3025, 3033, NX 400Z-2 ¶ 60 (Clark); AX 503G-"I", AX 514A-B; IX 79A, IX 96D, IX 107, IX 116B. See also Finding 99. The only circulation price increase put into effect during Tiger I was a Sunday increase from 50 cents to 75 cents which was projected to generate \$5.5 million in additional revenue. IX 88D. This increase was originally planned for September 1984 but was delayed until January 1985 because of uncertainty about the response of the News. Chapman 1953, Lawrence 3012-13. Although the News eventually followed the increase in March 1985, the Free Press lost circulation in the interim, and its failure to improve overall Sunday circulation may still be reflective of the 1985 decision. Hall 1262-64, Chapman 1954, 1958-59, 2018-19, Lawrence 2957-58; NX 100Z-46 to Z-45 ¶ 146 (Chapman).

29. Profits were also out of the question for the News since its strategy was to keep the pressure on the Free Press with low circulation and advertising prices that would result in clear dominance or resumption of the JOA negotiations on terms favorable to the News.⁵⁶ This strategy was to be pursued even if it meant that losses were inevitable⁵⁷, and even though News executives believed that the probability of either paper folding was close to zero.⁵⁸

30. Operating losses, which first appeared at the Free Press in 1979 and the News in 1980, grew as the depression deepened and the costs of Tiger I (and the News's own similar initiatives) increased. While some progress was seen at the Free Press in the form of circulation gains⁵⁹, these gains failed to achieve advertising share-of-field improvement in the face of sharp discounting by the News.⁶⁰ The overall goal, however, of dominance was unchanged as revealed in the following Free Press recapitulation:

The original Tiger concept remains solid — that the Free Press would seek to gain supremacy in every single significant category of competition with The Detroit News and to convert that supremacy to domination of the Detroit market.⁶¹

31. With the goals of market dominance or a JOA firmly in mind, Free Press management ordered a reevaluation of the

⁵⁶Clark 1385, 1394-99, 1401-07, 1436-37, Nelson 3369, 3434; NX 400-"O" ¶ 32 (Clark); AX 501H, AX 556; IX 361.

⁵⁷Clark 1397-99, 1436, Nelson 3368.

⁵⁸IX 72A; see also Clark 1392-93, 1437.

⁵⁹IX 111B, IX 118C.

⁶⁰NX 100 Z-22 to Z-23. ¶ 98 (Chapman); IX 111C-D, IX 118D, IX 150D, IX 160B, IX 207A.

⁶¹AX A, p. 1.

Tiger initiative in February 1985.⁶² A reaffirmation of the market dominance strategy led to Tiger II, an expanded and more integrated approach which coincided with the reorganization of the management team of the Free Press. David Lawrence was named publisher, and to run the business end of the paper, Knight-Ridder brought in Robert Hall as General Manager and Jerry Tilis as President, both veterans of the successful Philadelphia campaign by Knight-Ridder's *Inquirer* and *News* to gain dominance over the *Bulletin*.⁶³

32. Tiger II was to be implemented between 1985 and 1987.⁶⁴ The centerpiece of the plan was expansion of the Riverfront Plant. The expansion, like the original construction, was primarily intended to improve the Free Press's ability to deliver post-midnight papers and thus to make inroads into the News's historical lead in the close-in circulation zones.⁶⁵ operating losses, it was hardly perceived as the last gasp of an expiring homunculus. On the contrary, it was undertaken because Free Press and Knight-Ridder executives believed that many aspects of Tiger I had been successful and that the goals of dominance and eventual profitability were within reach. As one senior KnightRidder executive put it, "[Operation Tiger] has been a success" and "the project [proposed press expansion at Riverfront] is crucial to our winning dominance

⁶²IX 161D, H. See also Chapman 1925-26, 2140.

⁶³Hall 921, 1144-45, Chapman 1779-81, Lawrence 2821-22; NX 200A-B ¶ 3 (Hall); IX 133, IX 161D, IX 230A.

⁶⁴AX A. See also IX 342A.

⁶⁵Hall 955-956, 974, 1103, 1250-51, Clark 1442, Chapman 1782-85, 1787-91, 1816, Nelson 3376-77; AX 501A-B, AX 502E, G, AX 515C-D; IX 72Z-15, IX 96C, IX 99F, Z-11 to Z-12, IX 126B, K, N-'O', IX 136B, IX 150E. Knight-Ridder executives believed that the original Riverfront Plant construction had been undertaken with inadequate planning, necessitating the later expansion with its concomitant loss in circulation momentum during the start-up phase of the new press operations. IX 265J-K.

in one of the nation's top half-dozen markets."⁶⁶ This view echoed the sentiments of Free Press management —

If the strategy for making the Detroit Free Press the dominant newspaper in its market were failing, there would be no need to consider additional press capacity for the Free Press. In fact, that strategy—agreed upon by Knight-Ridder and Free Press management in the spring of 1984—is working so well that the Free Press is taxing the capacity of its riverfront plant to sustain post-midnight production.⁶⁷

33. The presentation by Free Press executives to the Knight-Ridder board in justification of the Riverfront Plant expansion included various financial scenarios and projections. These projections did not foresee operating profits until at least 1990 and under some scenarios even later.⁶⁸ Nonetheless, on March 8, 1985, the Knight-Ridder Board approved a capital expenditure of \$22.3 million for the Riverfront Plant expansion and thereby indicated confidence in the predictions of Free Press executives that the investment would eventually bring dominance and a profit to Knight-Ridder shareholders.⁶⁹ According to Chapman —

In late June, we broke ground in Detroit on a \$22 million press expansion project due to be completed in early 1987. This will increase our production capacity by approximately 25 percent — of signifi-

⁶⁶AX 501A; See also Hall 958-59, 970, 990, Chapman 2086, IX 354B, and statement of a Knight-Ridder executive justifying the Riverfront Plant expansion because "we believe confidently that we will become dominant". Morton 2326.

⁶⁷AX 502E. See also IX 136B, IX 270A, IX 371A-F.

⁶⁸Hall 1310-11, Chapman 1829-33, 1840; AX 501Z-2 to Z-4; IX 126Z68 to Z-69.

⁶⁹AX 501A; IX 141A-B, IX 147B-C.

cant importance in the competitive struggle for supremacy in Detroit. Circulation growth of the Detroit Free Press has been encouraging in the past few years, and we expect this trend to continue. This investment reaffirms our confidence in our prospects in the Detroit market and in our newspaper and its management and employees. We believe the return to our shareholders from this investment will be a good one.⁷⁰

Knight-Ridder management gave the following additional justification for the Riverfront Plant expansion:

The Detroit market—the fifth largest in the U.S.—generates approximately \$300 million dollars in total newspaper revenues, which considering the total dollars for which we are competing, we believe that this capital expansion is a wise investment on the part of the KRN shareholders. Not only are we encouraged by the significant growth in circulation but we are heartened by a recent readership study by Scarborough, which shows the Free Press in the important eight-county area gaining more than 11 times as many . . . readers as did The News, and with even larger gains on Sunday. More significantly, the Scarborough study shows Free Press readers have stronger demographic profile than readers of the Detroit News. We are not encouraged by our operating losses. But we are convinced of two things: a \$300 million dollar newspaper market is a prize worth fighting for, and KRN overall will continue to show steady earnings growth while this competitive battle continues.⁷¹

⁷⁰IX 354B.

⁷¹Morton 2324.

34. Because the Riverfront Plant expansion was not completed until December 1986, the added capacity deemed so essential for the confrontation with the News was not even available to the Free Press until six months after the JOA application was filed.⁷²

35. With the completion of the Riverfront Plant expansion, the Free Press's printing facilities are generally regarded as superior to those of the News in terms of reducing waste, ability to expand the number of operating presses, press layout, and the quality of its offset equipment.⁷³

36. In addition to the Riverfront Plant expansion, Tiger II embraced many other specific initiatives including long-term growth in circulation, the selection of target advertising accounts for special sales efforts, the development of specific lineage and share of field goals, reorganization of the newsroom, zoned editions, and major editorial improvements.⁷⁴

37. Tiger II set a financial goal of reducing operating losses by 15% a year but like Tiger I it did not anticipate operating profits while the plan was being implemented. In short, the Free Press and Knight-Ridder recognized that the goals of market dominance or a favorable JOA would involve a long-term effort and that this effort might entail substantial losses over an extended period of time, for not only did the plan embrace the huge expenditures for the Riverfront Plant expansion

⁷²Hall 974-75, Chapman 1845-47, 2086; AX 300C ¶ 5 (Baseman). In the post-JOA period of declining morale and circulation loss, the new presses at Riverfront have only been used to provide fill-in capacity while other presses were out of service for routine maintenance or when there was a sudden surge in demand, as occurred after the August 1987 air disaster at Detroit Metro airport. Hall 1102-1107, Lawrence 3006; AX 8E.

⁷³Clark 1472-75, Neuharth 1550, Nelson 3358-59, 3367; IX 218B, IX 246A-U.

⁷⁴AX A, AX 504A-Y.

sion, but Tiger II's "Program Expense Summary" for 1986-1987 projected that 78 new full-time employees would be needed in order to carry the plan forward. The additional labor and benefit expenses were estimated at \$6.4 million, and the total costs projected for Tiger II (apart from the Riverside Plant expansion) were \$12.9 million.⁷⁵

38. Despite the failure of the Free Press to meet specific circulation and advertising share goals set either by Tiger I or Tiger II⁷⁶, the two Tiger plans brought the Free Press circulation lead⁷⁷, and throughout 1985 and early 1986 the plans were being defended by Free Press and Knight-Ridder executives as a successful effort that would lead eventually to dominance.⁷⁸

39. At the same time that the Free Press was challenging the News's circulation lead with the Tiger plans, ENA was coming under pressure from dissident shareholders. These dissidents not only believed that ENA may have been undervalued but they were growing increasingly disenchanted with the poor financial performance of the paper as the News adopted costly countermeasures to the Tiger plans in the form of circulation and advertising discounting.⁷⁹ This unrest in turn attracted the attention of a group of outside investors who viewed ENA as ripe for a hostile takeover. As part of its exploratory work, the investors made contact with Knight-Ridder about the prospects for a Detroit JOA. While Knight-Ridder representatives refused to have substantive discussions on

⁷⁵Hall 955, Chapman 2049-52; IX 161Z-21 to Z-23.

⁷⁶Hall 1157-59, 1238-39, Chapman 1792, 1795, 1853, 2016; IX 224C.

⁷⁷Hall 958-59, 1043-44, Clark 1436-37; AX 501A; IX 354B.

⁷⁸Hall 958-59, 1214-15; AX 501A-B, AX 503A-P, AX 504A-Y, AX 505AGG.

⁷⁹Clark 1444-47; NX 100Z-15 P 85 (Chapman); AX 505A; IX 255B.

the question, they told the outside investors that Knight-Rider might be interested in pursuing JOA negotiations should these investors be successful in a take-over attempt.⁸⁰

40. In early August 1985, Peter Clark concluded that ENA could no longer remain a closely-held corporation. He invited Gannett among other to bid for the company. Allen Neuharth, Gannett CEO, agreed in principle to the acquisition and simultaneously contacted Knight-Ridder management to determine if Knight-Ridder was still interested in forming a JOA.⁸¹ Gannett's motivation in pursuing the JOA is plainly shown in an August 1985 internal memorandum:

It appears that the only way this investment could be self-supporting would be through substantial earnings gains at the Detroit News. Obviously, this would be very difficult without a JOA.⁸²

41. In response to the Neuharth initiative, Knight-Ridder informed Gannett of its continuing interest, an assurance which Gannett took into account in formulating its final bid for the ENA stock.⁸⁴

42. Senior officials of Knight-Ridder and Gannett including Chapman and Neuharth met 16 times between August 1985 and April 1986 to discuss the JOA.⁸⁵ At these meetings the parties identified common ground on such issues as duration of a JOA and publication of the Free Press in the morning and the News in the evening. There were, however, differences

⁸⁰NX 400S-T ¶¶ 41-43 (Clark).

⁸¹Neuharth 1599, Chapman 1908; AX 7A.

⁸²IX 165A.

⁸³Chapman 1908.

⁸⁴See AX 558A-F, AX 559A-C, IX 348E-F for evidence that a JOA was part and parcel of Gannett's original planning for the ENA acquisition.

⁸⁵AX 7A; IX 348B-E.

to be resolved. The parties remained apart on issues of structure and control. Gannett, for example, proposed that the Free Press just fold its business operations, leaving Gannett to carry out all production, sales, and distribution functions for both papers.⁸⁶ Knight-Ridder, however, was far from willing to concede that it had lost the great-Detroit newspaper war. This is shown in the January 20, 1986, letter and memorandum from Chapman to Neuhart, the text of which appears in Finding 49.

43. During the JOA negotiations the question was raised as to which newspaper would be presented as the "failing" one and the parties considered the possibility of both applying as failing newspapers.⁸⁷

44. The JOA negotiations were advanced by the parties' recognition that there existed "an economic window of opportunity" which might be closed if both papers became marginally profitable.⁸⁸

45. The JOA negotiation was also advanced by the Free Press's realization that it was not confronted by the deep-pocketed Gannett rather than the independent ENA.⁸⁹ immediately cutting the News's out-state price from 20 cents to 15 cents.⁹⁰

46. As for Gannett, it knew that the news would incur heavy

⁸⁶AX 513A-D.

⁸⁷Neuharth 1654-57, Chapman 2098-2106. See also AX 511A; IX 492.

⁸⁸IX 228B. See also Neuharth 1726, 1732-34, AX 581C. Applicants also believed "that the political climate is right for a JOA". AX 512A. For other evidence of how the filing of a JOA application influences business decisions, see AX 518E in which a 1986 building expansion is delayed because "the announcement of a construction project by the 'failing paper' will be at the least misunderstood by many".

⁸⁹Chapman 1899-1903, 1918, Morton 2343; IX 197A.

⁹⁰See Finding 105.

losses for the foreseeable future so long as it had to compete against Knight-Ridder.⁹¹

47. On April 11, 1986, the Free Press and the News executed a joint newspaper operating agreement while the parent companies simultaneously signed a cooperation and guaranty contract.⁹²

48. The JOA was announced jointly by Knight-Ridder and Gannett on April 14, 1986. They said —

Over a period of more than a quarter century since this became a two-newspaper city, the Free Press and The News have fought to a virtual draw.⁹³

4. *The Status of the Rivalry at The Time of the JOA Application.*

a. *Overview*

49. The public announcement that the JOA reflected a "virtual draw" in the Detroit newspaper war came just four months after Chapman had sent Neuharth the following memorandum (described by Chapman in the accompanying letter as the "ra-

⁹¹Neuharth 1617-18, Chapman 1899-1903, Rosse 2810-11; NX 100Z-40 ¶ 135 (Chapman), NX 300U ¶ 47 (Neuharth). As a matter of corporate strategy, Gannett avoids markets where there is direct daily paper competition. Rosse 2731-32. With the notable exception of its long battle with ENA (and then Gannett) in Detroit, Knight-Ridder has pursued a similar policy. Chapman 1987; IX 173D, IX 265M.

⁹²NX C-2, Ex. 1.

⁹³IX 254A. The claim by Chapman (Chapman 1943-44, 2130-31) that the press release was a sop to the morale of the Free Press staff is contrary to the evidence. At the highest levels of KnightRidder management, the view was held that "The newspapers have fought to a standstill." AX 512A.

tionale supporting our position on the market place strengths of the Free Press compared with the News''):

Private and Confidential

January 20, 1986

Although both the News and the Free Press operate in a difficult economic environment that has produced significant losses over an extended five-year period, an assessment of the relative strength of the two newspapers leads us to the firm conclusion that any agency that may be negotiated, reflecting the reality of the marketplace, must result in a 50/50 arrangement.

The Detroit Free Press is a well-managed newspaper with a loyal readership base and a prove and continuing capacity to expand its reach.

Whether we go all the way back to the early days of a two-paper Detroit market or concentrate on the last few years, the evidence is clear: the Free Press keeps improving its comparative position, and especially among readers who are better educated and better off financially.

There have been blips along the way, but the overall trend is strongly favorable to the Free Press.

The Free Press has a number of competitive advantages. They include:

- We have clear leadership in the critically important morning field.
- Overall readership of the Free Press continues to exceed that of the News.
- There is a high degree of readership duplication, and among duplicate readers the Free Press is Favored by a significant margin.
- In upscale demographic categories, the Free Press is the clear-cut favorite.

- Circulation trends over a 24-year period show dramatic Free Press improvement.
- The Free Press has improved advertising share of field over time.
- We are better printed and are recognized by readers as having better color.
- The Free Press has one of the outstanding young leadership teams in the business.
- Our journalistic peers recognize the Free Press as producing higher quality work.
- The Free Press continues to be the innovative leader in the Detroit field.
- Our new presses, in the light of demonstrated growth potential in the metropolitan area, give us momentum.

A look at some circulation figures should set the stage for further consideration of these points. The numbers below are for the audit year ending March 31, 1985.

<i>Detroit Daily Circulation</i>				
	<i>Detroit Free Press</i>		<i>Detroit News</i>	
	1985	5-year growth	1985	5-year growth
City + RTZ	504,030	38,870	592,056	(111)
AOZ	140,748	752	63,683	26,297
Total	644,778	39,622	655,739	26,186

<i>Detroit Sunday Circulation</i>				
	<i>Detroit Free Press</i>		<i>Detroit News</i>	
	1985	5-year growth	1985	5-year growth
City + RTZ	556,472	61,433	776,739	22,693
AOZ	234,423	17,868	95,280	26,451
	790,895	79,301	872,019	49,144

This shows Free Press growth during the 1980-85 period of 39,622, with almost all of it (38,870) coming in the city Zone

plus the RTZ. During the same period the Detroit News daily growth was 26,186, and it actually grew more than that (26,451) in the AOZ. In the City Zone plus RTZ, the News lost 111. On Sunday, as the table shows, the Free Press outgained the News in the City Zone plus RTZ by 61,433 to 22,693. Even though the News circulation totals are larger, we think the figures reflect the Free Press' increasingly strong competitive position. That becomes clearer as we examine the Free Press advantages listed earlier one by one:

1. *Morning dominance.* We list this first, because it's most important. As your own figures show, Detroit increasingly is a morning market. A recent Chris Urban study (dated March 1985) showed that 60% of those reading both papers actually read the Free Press in the morning, with the remaining 40% reading it later in the day. Only 30% of duplicate readers actually read the News in the morning, with the remaining 70% reading it either in the afternoon or evening. The same study shows that among "loyal" Free Press readers (those reading the paper at least four times a week), 68% read it in the morning. Only "25% of loyal" News readers actually read the News in the morning. We are holding firmly to the morning franchise.
2. *Readership.* Surveys continue to show that the Free Press has greater overall readership. The Urban study mentioned above shows that 30% of Michigan adults read the Free Press on an average daily basis, while the News is read by 28% of Michigan adults daily. A 1985 Simmons-Scarborough study shows the Free Press with 1,880,900 readers in Michigan daily and the News with 1,775,400. On Sunday, according to the study, the Free Press lead in readers is 2,294,300 to 2,186,000.

3. *The duplicate factor.* The Detroit market is one with a high duplicate readership. The Urban study shows that 37% of the average daily audience of the Free Press also reads the News, while 39% of the average daily News audience also reads the Free Press. Among those duplicate readers, the Free Press is the "favorite paper" of 44% and the News is the "favorite paper" of 30%. Also among duplicate readers, 73% are "loyal" Free Press readers compared to 65% who are "loyal" News readers. The survey findings give meaning to a fact that those who work or have worked at the Free Press are aware of: To a remarkable extent, Free Press readers seem to care about it.
4. *Demographics.* The Simmons-Scarborough study shows the Free Press is the dominant daily paper among adults in virtually all upscale demographic categories. The Free Press has more readers than the News among adults in each occupation category: white collar, professional/manager, clerical/sales and blue collar. Between 1978 and 1985 the Detroit-area ADI* was changed from eight counties to nine counties. A comparison of market reach for eight original counties in two Scarborough studies, one for 1978 and one for 1985, shows solid competitive improvement for the Free Press:

		Free Press Daily	News Daily	Free Press Sunday	News Sunday
Percentage market reached	1978	38.1	45.4	38.8	54.1
	1985	40.9	43.0	42.9	52.1
College graduates	1978	48.7	44.1	50.5	51.7
	1985	52.8	44.2	53.4	50.7

* "ADI" refers to Area of Dominant Influence, a nine county (Lapeer, Livingston, Macomb, Monroe, Oakland, Sanilac, St. Clair, Washtenaw and Wayne) measure of demographics in terms of age, income, and occupation. NXC, Appendix I, p. 22, NXC-2, § .22; AX 503D. [ALJ note]

Household income	1978	47.0	50.8	48.5	57.3
\$35,000 and up	1985	47.9	44.6	47.7	54.2
Professionals/	1978	50.2	45.2	51.2	52.6
managers	1985	49.6	46.2	52.6	51.1

5. *Circulation trends.* Similarly, comparing circulation figures from the September 1961 ABC statement, the year after the News bought the Times, with September 1985 figures, shows dramatic Free Press improvement.

	City + RTZ	Change	Total	Change
<i>Free Press</i>				
Daily 1961	421,276		550,000	
Daily 1985	496,339	+ 75,063	634,466	+ 84,466
Sunday 1961	407,891		600,014	
Sunday 1985	532,198	+ 124,307	754,615	+ \$154,601
	City + RTZ	Change	Total	Change
<i>Detroit News</i>				
Daily 1961	694,252	723,578		723,578
Daily 1985	575,657	-118,595	645,016	-78,562
Sunday 1961	738,811		914,523	
Sunday 1985	743,660	- 40,151	837,821	- 76,702

6. *Advertising trends.* Advertising lineage figures mean less than advertising revenue figures, but only lineage is available. Here, too, there is improvement over time. Here are 1961-1985 share of field figures for total advertising lineage:

	Daily	Sunday	Total
<i>Total</i>			
Free Press 1961	37.9%	28.9%	34.3%
Free Press 1985	42.7%	41.1%	41.3%

There have been ups and downs but the trend has been upward.

7. *High quality printing/color.* We are the daily with full offset printing, and our printing quality has had an

effect in the marketplace. Despite the News' heavy investment in color in recent years, the Urban study shows that readers perceive us as having the best color. (Among duplicate readers, for example, 41% say the Free Press has the best color, and only 19% say the News has the best color.)

8. *Quality of Leadership.* The Free Press has built an outstanding leadership team, young but experienced, bright and energetic. David Lawrence is generally recognized as one of the rising newspaper leaders in the country. Jerry Tilis and Bob Hall played major roles in building a winning operation in Philadelphia, and they bring expert metropolitan experience to their current jobs. Joe Stroud carries great respect within Detroit and Michigan and in the profession generally. Kent Berhard is a seasoned newsman with strong organizational skills and a commitment to excellence. Pete Pitz in production and Steve Morris, our new vice president/advertising, are outstanding talents in their fields. the Free Press tradition, going back to Al Neuharth's days there, is to put out an outstanding product with a lean, efficient staff. That's what we're doing now.
9. *Recognition by our peers.* The Free Press has won six Pulitzer Prizes (the News two). In four of the last five years, the Free Press has either won a Pulitzer Prize (once) or been listed as a runner-up. In each of the last two years, the Free Press has won the Michigan Press Association General Excellence Award, has dominated state AP and UPI contests, and has won several top national awards. During recent years the News has won one Pulitzer Prize, and the people who won it now work for the Free Press and the Inquirer.

10. *The cutting-edge tradition.* Even without the circulation lead, the traditional innovator in Detroit journalism has been the Free Press. A few examples come quickly to mind: Action line, offset printing, use of color, Business Monday, the Science/High Tech section, foreign coverage, the visible accent on credibility, pricing. Generally, the Free Press has led the way; the News has followed.
11. *Momentum.* Our recent circulation growth has been concentrated where it counts most, in the metropolitan Detroit area, while News gains have largely been outstate. The demand for late papers reached the point that we decided to invest \$22 million in new press equipment to help satisfy it.

Note: Here's basic information about surveys mentioned in this memorandum:

There are several references to a study done by Urban & Associates for the Free Press, with interviewing done in the latter part of 1984 and results delivered in March of 1985. There were 3,153 respondents from throughout Michigan. The Simmons-Scarborough references are to a national study of 56 ADIs dated this year, with 1,428 interviews in the Detroit ADI. Local sponsors were the Free Press, the News and the Oakland Press. Also referred to was a 1985 Scarborough Report on the nine-county Detroit ADI, involving 2,581 respondents. Sponsors were the Free Press, three TV stations, 14 radio stations, three magazines and three ad agencies. This report was compared to a similar one by the same organization in 1978.⁹⁴

⁹⁴AX 506A-G.

50. Chapman's January 20th memorandum undoubtedly presents the best case for the viability of the Free Press.⁹⁵ But since most measures of newspaper rivalry — total circulation, circulation in key geographical zones ("CZ", "RTZ", "PMA"), lineage, readership, demographics, and circulation revenue — are readily verifiable, there is no basis for assuming that Chapman believed that he could get away with far-fetched claims that would hoodwink Neuharth.⁹⁶ Altogether, the January 20th memorandum was a reasonable summary of the data available at the time.⁹⁷ See Findings 51 to 82.

b. Circulation

51. Although total circulation figures do not tell the whole story of the rivalry between two metropolitan papers (as indicated in Findings 56 to 64, Sunday circulation and circulation in certain key areas or "zones" are particularly important to local retail and classified advertisers who wish to reach the largest possible audience within reasonable travel distance), nevertheless, the record indicates an overriding concern at both the Free Press and the News about total circulation figures. Thus a perceived need to hold or overcome the narrow differences in total circulation has played a key role at both papers in devising marketing strategies, especially in making pricing decisions. Both papers believed that if the Free Press were able to promote itself as the number one daily,

⁹⁵Chapman 1931, 1933-38.

⁹⁶See IX 267A and Chapman 1937-38; NX 100N-Q ¶¶ 32-35 (Chapman). It should also be noted that during the JOA negotiations, the parties exchanged financial information. Neuharth 1613-14.

⁹⁷Chapman acknowledged that considering the deep losses at both papers and "since most of the criteria about which most of the outside world looks at newspapers were very close together. . . a 50/50 profit split would be appropriate for the Free Press." Chapman 1910-11.

this would not only affect staff morale but would also soon change advertiser perception of the two papers' relative commercial value.⁹⁸

52. The News's purchase of the *Detroit Times* in 1960 gave it a substantial lead (183,751) over the Free Press in daily circulation. This lead, however, could not be held for several reasons: the former subscribers of the *Detroit Times* found that the News was a far different paper than the *Times*; the News bore the brunt of a 1967-68 strike and experienced a greater loss than the Free Press as a result of the 1967 riots; the News's lead was vulnerable to the growing preference for morning newspapers; and at least some attrition was attributable to the success of the Tiger initiatives adopted by the Free Press.⁹⁹

53. By 1976, the daily circulation battle has been fought to a virtual tie, and between 1976 and 1986 when combined daily circulation of the two papers grew from 1.25 million copies to over 1.3 million, the Free Press's share of total daily circulation never fell below 49% as shown in Table 5.

⁹⁸Hall 994-95, Clark 1354, 1356, 1385, 1396, 1436-37, 1504-05, 1511-13, Neuharth 1625-26, Morton 2317-18, 2357-58, Nelson 3434; NX 300''I''-J ¶ 25 (Neuharth), NX 400''O'', Z-2 ¶¶ 32, 60 (Clark); IX 134A-B. On a more pragmatic level, when newspapers are sold the selling price is calculated on the basis of \$1200 to \$1300 per subscriber. Neuharth 1536, 1580, 1634.

⁹⁹Findings 14, 16; Clark 1500-02; NX 400E-F ¶ 13 (Clark).

Table 5: Combined Free Press and News Daily Circulation (1960-1987) And Free Press Share (%)

	(Combined Free Press and News Circulation)	(Free Press Share)
1960*	1,344,986	36.5%
1961	1,109,207	47.4%
1962	1,256,172	42.3%
1963	1,221,972	41.6%
1964	1,219,038	42.1%
1965	1,179,596	41.8%
1966	1,198,163	42.5%
1967	1,236,979	44.1%
1968	1,293,480	45.8%
1969	1,141,485	46.6%
1970	2,201,958	47.9%
1971	1,239,509	47.9%
1972	1,230,759	47.0%
1973	1,269,592	47.4%
1974	1,301,685	47.3%
1975	1,272,044	48.9%
1976	1,250,233	49.8%
1977	1,255,837	49.4%
1978	1,246,558	49.3%
1979	1,245,606	49.3%
1980	1,234,709	49.0%
1981	1,232,450	49.4%
1982	1,247,626	50.0%
1983	1,280,880	49.5%
1984	1,283,070	49.3%
1985	1,300,517	49.6%
1986	1,283,264	49.8%
1987	1,327,698	48.8%

Notes: Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, the figure shown is a weighted average.

**Detroit Times* circulation is included in 1960 combined figure.

Source: JX 1.

54. For the six months ending March 31, 1986 — the last period reported before the JOA was announced — the News's margin had been reduced to slightly more than 5,000¹⁰⁰, and there is persuasive evidence that on or about the date of the announcement of the JOA, the Free Press had all but eliminated the News's daily circulation lead.¹⁰¹

55. In the last months of 1986 and the first quarter of 1987, there was a sudden surge in favor of the News which resulted in a widening of the daily circulation gap. This was fairly predictable and is consistent with the history of other JOA's which shows that once an agreement is announced it has an adverse effect on the morale and performance of the designated "failing newspaper".¹⁰² The surge in the News's daily circulation is also attributable at least in part to a significant increase in the News's competitive vigor following the Gannett acquisition (as shown by promotions and discounting), which occurred at the very time that the Free press was cutting back in the same areas.¹⁰³

56. While the News was not able to hold onto the combined News—*Detroit Times* Sunday readership, over the years the Free Press has not done nearly as well in challenging the News's Sunday lead as it has in the daily circulation battle. This is shown in Table 6.

¹⁰⁰JX 1. See also IX 262A-B for evidence of News apprehension about the prospects of losing the circulation lead by the third quarter of 1986. For other indications of Free Press gains in early 1986, see IX 258.

¹⁰¹IX 270A-B, IX 272A, IX 303A.

¹⁰²Hall 1341-42, Clark 1518, Neuharth 1733-34, Chapman 2117-18, Morton 2312; AX 516A-C, AX 519A-C; IX 236A-D, IX 274D, IX 281A, IX 282B.

¹⁰³Hall 1050-52, 1057, 1165; AX 519A-C, AX 529A-C, AX 530A-B, AX 531A, AX 532, AX 539A-C, AX 541A; IX 274B-D. The News also gained circulation from its cut in the out-state daily price. NX 300J-K ¶ 27 (Neuharth).

Table 6: Combined Free Press And News Sunday Circulation (1960-1987) And Free Press Share (%)

	(Combined Free Press and News Circulation)	(Free Press Share)
1960*	1,597,126	32.7%
1961	1,323,291	42.5%
1962	1,511,793	38.8%
1963	1,498,370	37.7%
1964	1,506,163	38.0%
1965	1,478,388	37.5%
1966	1,491,219	37.6%
1967	1,542,653	38.6%
1968	1,582,599	40.1%
1969	1,408,653	41.4%
1970	1,480,484	42.7%
1971	1,508,621	43.0%
1972	1,518,569	44.2%
1973	1,547,149	45.5%
1974	1,569,475	46.0%
1975	1,560,609	47.4%
1976	1,561,415	47.4%
1977	1,533,854	46.6%
1978	1,536,014	46.7%
1979	1,534,646	46.3%
1980	1,534,469	46.4%
1981	1,553,901	46.9%
1982	1,578,060	47.9%
1983	1,625,385	47.7%
1984	1,646,552	47.8%
1985	1,662,914	47.6%
1986	1,583,360	47.3%
1987	1,575,385	46.7%

Note: **Detroit Times* Circulation is included in 1960 combined figure.

Source: JX 2.

57. The fight for Sunday circulation reflects the importance of this edition. The Sunday paper not only has the largest cir-

ulation and the most editorial material and advertising, but it is also the edition that is perused the longest by readers. For all these reasons, advertisers are willing to spend more for space in the Sunday edition.¹⁰⁴

58. Apart from daily and Sunday circulation, newspaper competition is measured by performance in certain key areas or "zones" — the Primary Market Area ("PMA"), The City Zone ("CZ"), and The Retail Trade Zone ("RTZ").¹⁰⁵ These areas are important because retail and classified advertisers are most interested in reaching readers who live or work within the area where the advertisers themselves are located. Conversely, retailers and classified advertisers are unwilling to pay as much to have their message delivered to readers who are too remote from them to be likely potential customers.¹⁰⁶

59. As indicated in Finding 9, the Primary Market Area ("PMA") consists of Wayne, Macomb, and Oakland counties. Over 87% of the population of the Detroit metropolitan area and about 41% of Michigan's total population resides in the Detroit PMA. In addition, the Detroit PMA accounts for about 50% of Michigan's personal income. The three-county PMA is the area of most importance to local Detroit advertisers — i.e., those who provide more than 75% of the revenue to both the Free Press and News.¹⁰⁷

¹⁰⁴NX 100L-N ¶¶ 27, 31 (Chapman).

¹⁰⁵Hall 1040; NX 100Z-13 ¶ 79 (Chapman), NX 200L-M ¶ 28, (Hall), NX 300'I'-J ¶ 25 (Neuharth).

¹⁰⁶NX 100S ¶ 40 (Chapman), NX 700U-V, Z-16 to Z-17 ¶¶ 32, 69 (Morton); AX 515A.

¹⁰⁷NX C-1, p. 4.

60. Trends within the PMA are the most reliable and important indicators of circulation strength.¹⁰⁸ Although the News enjoys a lead in daily PMA circulation, at least prior to 1987 there was evidence of a strong trend favorable to the Free Press. Between 1980 and 1986, the Free Press's share of daily PMA circulation increased from 42.7% to 45.7%, representing a gain of 36,000 for the Free Press, and a loss of 22,000 for the News as shown in Table 7.

61. While the Free Press has made gains against the News's Sunday lead in the PMA, the News still has a substantial lead as shown in Table 8.

62. The Detroit City Zone ("CZ") consists of the corporate limits of the city and the immediately adjacent areas in Wayne, Macomb, and Oakland counties. The Detroit Retail Zone ("RTZ") embraces those parts of Wayne, Macomb, and Oakland not included in the CZ as well as Monroe, Livingston, and Washtenaw counties, and nearby areas in Canada. Apart from the PMA, the CZ and RTZ are generally regarded as the geographic areas that metropolitan Detroit retailers are most interested in reaching because this is where most of their prospective customers live.¹⁰⁹

63. The CZ and RTZ, which traditionally have been the areas of News strength,¹¹⁰ are usually reported together as shown in Tables 9-10.

¹⁰⁸Rosse 2681-82, 2685, 2738, 2814; NX 400V-W ¶ 50 (Clark). A sudden increase in the News's lead in daily PMA circulation for the period ending March 31, 1987, is attributable to the factors cited in Finding 55.

¹⁰⁹Clark 1463; NX C-1, Appendix I, pp. 26, 28, NX C-5 ¶ 1C, NX 100'O'-P ¶ 33 (Chapman), NX 700Z-17 to Z-18 ¶¶ 70-71 (Morton); IX 126K.

¹¹⁰Nelson 3417-18, 3420-21.

Table 7
Combined Free Press And News Daily Circulation (1960-1987)
In PMA Counties And Free Press Share(%)

	(Combined Circulation)				(Free Press Share)			
	MACOMB	OAKLAND	WAYNE	PMA TOTAL	MACOMB	OAKLAND	WAYNE	PMA TOTAL
1960*	109,415	140,041	894,078	1,143,534	27.5%	37.8%	28.7%	19.7%
1961	108,942	141,375	862,437	1,112,754	31.3%	42.5%	37.4%	37.5%
1962	108,445	145,001	817,164	1,070,611	28.8%	42.9%	35.6%	35.9%
1963	111,902	138,760	792,587	1,043,249	29.3%	43.2%	34.4%	35.0%
1964	114,410	138,891	784,750	1,038,051	28.6%	42.7%	34.8%	35.2%
1965	112,041	137,962	762,713	1,011,816	29.6%	44.0%	34.0%	34.9%
1966	119,977	143,159	760,992	1,024,128	30.9%	44.5%	34.7%	35.6%
1967	129,113	152,551	768,185	1,049,849	33.6%	45.1%	35.9%	37.0%
1968	136,819	166,271	786,616	1,089,706	34.8%	46.8%	37.6%	38.7%
1969	124,120	150,445	685,979	960,544	34.7%	49.1%	38.5%	39.7%
1970	139,449	167,069	707,779	1,014,297	37.9%	49.7%	39.1%	40.7%
1971	143,677	176,029	714,087	1,033,793	36.2%	50.0%	38.9%	40.4%
1972	149,137	178,239	703,129	1,030,505	36.3%	50.5%	37.7%	39.7%
1973	159,605	188,610	714,937	1,063,152	37.3%	49.4%	38.2%	40.1%
1974	170,950	197,070	724,090	1,092,110	38.3%	50.3%	38.0%	40.3%
1975	167,104	206,999	691,396	1,065,499	39.0%	49.9%	39.9%	41.7%
1976	166,605	196,871	676,774	1,040,250	39.9%	53.8%	39.9%	42.5%

1977	174,286	199,116	664,725	1,038,127	39.3%	54.1%	39.6%	42.3%
1978	176,071	204,416	646,617	1,027,104	38.7%	54.2%	39.8%	42.5%
1979	178,739	211,777	631,690	1,022,206	38.5%	53.8%	40.2%	42.7%
1980	178,282	209,444	623,658	1,011,384	38.2%	54.1%	40.2%	42.7%
1981	177,935	211,414	615,792	1,005,141	38.1%	54.3%	40.9%	43.2%
1982	181,670	215,321	615,475	1,012,466	38.7%	55.2%	42.1%	44.3%
1983	183,405	221,914	623,844	1,029,163	39.6%	54.3%	42.0%	44.2%
1984	184,377	227,077	619,683	1,031,137	39.0%	54.2%	42.3%	44.3%
1985	189,856	235,550	617,500	1,042,906	40.2%	54.0%	43.0%	45.0%
1986	188,965	234,797	601,864	1,025,626	41.1%	53.4%	44.1%	45.7%

Notes: Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, the figure shown is a weighted average.

*Detroit Times circulation is included in 1960 combined figure.

Source: JX 3.

Table 8
Combined Table 8: Combined Free Press and News Sunday Circulation (1960-1987)
In PMA Counties and Free Press Share (%)

	(Combined Total)				(Free Press Share)			
	MACOMB	OAKLAND	WAYNE	PMA TOTAL	MACOMB	OAKLAND	WAYNE	PMA TOTAL
1960*	123,560	178,174	902,639	1,204,373	24.3%	33.3%	25.3%	26.4%
1961	119,763	179,446	863,286	1,162,495	28.4%	37.5%	34.3%	34.2%
1962	120,383	183,662	821,042	1,125,087	25.9%	37.0%	32.2%	32.3%
1963	126,126	181,304	806,823	1,114,253	26.0%	36.2%	30.3%	30.8%
1964	130,071	183,151	806,746	1,119,968	24.8%	35.5%	30.4%	30.6%
1965	132,715	187,784	794,136	1,114,635	24.9%	36.3%	29.5%	30.1%
1966	140,457	194,164	796,327	1,130,948	25.8%	36.7%	29.5%	30.3%
1967	150,820	205,277	812,532	1,168,629	27.7%	37.1%	30.2%	31.1%
1968	157,619	216,806	817,427	1,191,852	29.1%	38.6%	31.6%	32.5%
1969	150,555	200,064	726,110	1,076,729	28.6%	31.7%	32.6%	33.7%
1970	167,476	218,138	753,907	1,139,521	32.2%	41.8%	33.2%	34.7%
1971	170,178	225,972	749,968	1,146,118	30.5%	42.8%	32.8%	34.4%
1972	176,348	229,307	754,478	1,160,133	32.3%	44.4%	33.0%	35.2%
1973	185,050	237,330	759,045	1,181,425	34.2%	44.8%	34.1%	36.3%
1974	196,010	246,594	760,993	1,203,597	35.0%	46.5%	34.3%	36.9%
1975	196,335	260,755	738,746	1,195,836	35.7%	46.1%	36.1%	38.2%

48a

1976	199,381	255,211	740,930	1,195,522	36.1%	48.7%	35.2%	38.2%
1977	204,425	253,477	718,928	1,176,200	35.0%	48.7%	34.4%	37.6%
1978	206,758	261,733	705,352	1,173,843	34.6%	49.1%	34.4%	37.7%
1979	213,054	262,867	698,722	1,174,643	34.2%	48.7%	34.5%	37.6%
1980	212,965	265,188	695,993	1,174,146	34.1%	48.2%	35.1%	37.9%
1981	215,509	265,935	704,578	1,186,022	33.8%	49.2%	35.8%	38.4%
1982	219,315	278,969	702,999	1,201,283	35.0%	49.2%	37.6%	39.8%
1983	226,318	280,066	720,556	1,226,940	35.6%	49.4%	37.4%	39.8%
1984	227,526	288,439	722,256	1,238,221	35.5%	49.6%	37.7%	40.1%
1985	232,939	299,662	718,007	1,250,608	36.2%	48.7%	38.1%	40.3%
1986	227,782	288,558	683,841	1,200,181	36.4%	47.6%	38.7%	40.4%

Note: *Detroit times circulation is included in 1960 combined figure.

Source: JX 4.

49a

Table 9
Combined Free Press And News Daily Circulation (1960-1987)
In The CZ and RTZ And Free Press Share (%)

	(Combined Free Press and News Circulation)				(Free Press Share)		
	CZ	RTZ	CZ + RTZ	CZ	RTZ	CZ + RTZ	
1960*	709,162	473,749	1,182,911	29.7%	32.3%	30.8%	
1961	553,168	411,167	964,335	42.2%	40.6%	41.6%	
1962	632,943	474,023	1,106,966	36.9%	37.0%	36.9%	
1963	606,312	471,818	1,078,130	35.3%	37.0%	36.1%	
1964	592,852	480,050	1,072,902	35.8%	37.0%	36.3%	
1965	569,220	475,630	1,044,850	35.1%	37.2%	36.1%	
1966	565,117	493,224	1,058,341	35.6%	38.1%	36.7%	
1967	561,946	526,687	1,088,633	36.6%	40.1%	38.3%	
1968	570,496	557,299	1,127,795	37.9%	41.9%	39.9%	
1969	483,040	510,640	993,680	39.0%	42.4%	40.8%	
1970	492,777	557,448	1,050,225	39.5%	44.2%	42.0%	
1971	490,986	585,321	1,076,307	39.1%	44.1%	41.8%	
1972	472,891	598,679	1,071,570	37.9%	43.5%	41.0%	
1973	477,104	629,873	1,106,977	38.0%	44.2%	41.5%	
1974	473,931	661,443	1,135,374	37.6%	44.2%	41.4%	
1975	454,804	654,284	1,109,088	38.9%	46.0%	43.1%	
1976	434,117	649,793	1,083,910	39.7%	46.7%	43.9%	

1977	416,839	665,187	1,082,026	39.4%	46.3%	43.7%	
1978	408,474	662,946	1,071,420	38.5%	47.0%	43.8%	
1979	386,675	680,310	1,066,985	40.2%	46.2%	44.0%	
1980	377,919	679,408	1,057,327	40.3%	46.1%	44.0%	
1981	372,579	678,822	1,051,401	41.1%	46.2%	44.4%	
1982	368,935	690,190	1,059,125	42.5%	47.0%	45.4%	
1983	375,944	702,385	1,078,329	42.3%	46.9%	45.3%	
1984	373,332	706,940	1,080,272	42.8%	46.7%	45.4%	
1985	368,002	728,084	1,096,086	43.0%	47.5%	46.0%	
1986	355,300	726,154	1,081,454	43.7%	48.0%	46.6%	
1987	360,377	739,536	1,099,912	43.4%	47.5%	46.2%	

Notes:

Daily figures are an average of Monday-Saturday data from 1980 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, a figure shown is a weighted average.

* *Detroit Times* circulation is included in 1960 combined figure.

Source: JX 1.

Table 10
Combined Free Press And News Sunday Circulation (1960-1987)
In The CZ and RTZ And Free Press Share (%)

	(Combined Free Press and News Circulation)				(Free Press Share)		
	CZ	RTZ	CZ + RTZ	CZ	RTZ	CZ + RTZ	
1960*	701,540	572,598	1,274,138	25.9%	29.2%	27.4%	
1961	558,697	497,490	1,056,188	36.2%	36.6%	36.4%	
1962	626,625	572,683	1,199,308	33.2%	33.9%	33.5%	
1963	608,601	579,318	1,187,919	30.9%	33.1%	32.0%	
1964	600,643	591,402	1,192,045	31.0%	32.7%	31.8%	
1965	586,888	599,020	1,185,908	30.0%	32.7%	31.4%	
1966	583,494	621,349	1,204,843	29.8%	33.2%	31.6%	
1967	589,145	658,947	1,248,092	30.5%	34.4%	32.6%	
1968	585,697	685,131	1,270,828	31.4%	35.9%	33.8%	
1969	501,913	641,130	1,143,043	32.6%	36.9%	35.0%	
1970	517,597	690,899	1,208,496	33.0%	38.4%	36.1%	
1971	510,259	711,696	1,221,955	32.6%	38.6%	36.1%	
1972	500,908	733,652	1,234,560	32.8%	39.7%	36.9%	
1973	501,262	757,340	1,258,602	33.3%	41.4%	38.2%	
1974	491,210	791,347	1,282,557	33.6%	42.0%	38.8%	
1975	477,029	795,914	1,272,943	34.8%	43.4%	40.2%	
1976	465,892	805,173	1,271,065	34.6%	43.3%	40.1%	

52a

1977	441,056	808,349	1,249,405	33.5%	42.5%	39.3%	
1978	438,335	809,048	1,247,383	32.4%	43.2%	39.4%	
1979	419,855	827,744	1,247,599	33.5%	42.3%	39.3%	
1980	417,987	831,098	1,249,085	34.2%	42.4%	39.6%	
1981	419,135	842,048	1,261,183	35.2%	42.6%	40.1%	
1982	417,527	860,258	1,277,785	37.0%	43.6%	41.4%	
1983	425,007	880,847	1,305,854	37.1%	43.4%	41.3%	
1984	426,128	892,472	1,318,600	37.8%	43.4%	41.6%	
1985	412,478	911,733	1,333,211	37.4%	43.7%	41.7%	
1986	393,843	886,675	1,280,518	37.8%	43.6%	41.9%	
1987	387,323	887,410	1,274,733	38.3%	43.6%	42.0%	

53a

Notes: *Detroit Times circulation is included in 1960

Source: JX 2.

64. As seen in Table 9, there was a trend favorable to the Free Press in the CZ and RTZ prior to late 1986 and early 1987. This was confirmed in the following May 1986 assessment made by the News —

1. *Free Press* suffered losses outstate and gains in City and RTZ where we suffered substantial losses.
2. Continuation of this trend will adversely affect our advertising share of field.
3. Historically, losses in the city remain a very serious problem.
4. Past history indicates that if we do not reverse this figure by 9/30 the *Free Press* could lead us daily.
5. Overall, we are suffering a deterioration in the city and RTZ which has historically been our strength.¹¹¹

65. The All Other Zone ("AOZ") consists of the Michigan areas not covered by the PMA, CZ, or RTZ. This zone is often referred to as "out-state" to signify its removal from the Detroit area. The AOZ is not considered as important as the PMA, CZ, or RTZ because of the cost of serving it and its relatively low value to the retail and classified advertisers that form the backbone of a metropolitan daily.¹¹² The Free Press has consistently held the leadership in the AOZ with almost twice as many readers as the News.¹¹³

66. The Free Press's lower circulation levels in the PMA, CZ, and RTZ result in lower household penetration rate, still

¹¹¹IX 262B. See also Hall 1041-42, IX 263A-B. As indicated in Table 10, the favorable trend for the Free Press in the CZ and RTZ even continued into 1987 for Sunday circulation.

¹¹²NX C-1, Appendix I, p. 26, NX 800G ¶ 7 (Rosse).

¹¹³Clark 1386.

another indicator of relative attractiveness. The paper with the lower penetration rate is considered by many advertisers as the second and therefore less desirable buy.¹¹⁴

67. Newspapers and advertisers also tend to regard home delivery circulation as more valuable than single copy ("street") sales. Bad weather, holidays, and other factors may adversely affect street sales more than home deliveries. In addition, advertisers believe that their messages are more likely to be read and used by those taking home delivery. Furthermore, several members of the household typically read a newspaper delivered to the home whereas a single copy sale may or may not be taken home. Also, home delivered circulation unlike single copy sales can be directed at specific demographic groups.¹¹⁵ Prior to the announcement of the JOA, the Free Press had actually taken the lead in CZ and RTZ daily home delivery, and had showed some progress in Sunday home delivery as seen in Table 11.

68. The Free Press maintains its huge leadership "in the critically important field".¹¹⁶ It is by far Michigan's largest morning paper.¹¹⁷

69. At least until 1986, the Free Press had higher readership (total number of readers of each copy), greater circulation among the upscale consumers (in terms of education, occupation, and income) who are favored by most advertisers, and was the paper preferred by duplicate readers.¹¹⁸ The

¹¹⁴NX C-1, Appendix I, pp. 32-34, NX 100L ¶ 26 (Chapman), NX 700W-X ¶ 36 (Morton), NX 800Z-44 ¶ 128 (Rosse).

¹¹⁵NX C-1, Appendix I, pp. 33-34, NX 100P ¶ 34 (Chapman), NX 700X-Y, Z-20 ¶¶ 37, 75 (Morton), NX 800H ¶ 7, (Rosse).

¹¹⁶Chapman 1934; AX 506D.

¹¹⁷NX A, p. 62.

¹¹⁸Hall 979, 1187-88, Morton 2318-19; NX 203H; AX 503D, AX 506D-E, AX 569F, K; IX 85A-L, IX 119B, IX 237B.

Table 11
Combined Free Press And News Home Delivery Circulation (1960-1987)
In CZ and RTZ and Free Press Share (%)

	Daily			Sunday		
	(Combined Total)		(Free Press Share)	(Combined Total)		(Free Press Share)
	CZ	CZ + RTZ	CZ	CZ + RTZ	CZ	CZ + RTZ
1960*	593,736	1,066,910	26.6%	628,861	1,188,525	25.1%
1961	458,661	869,319	37.8%	491,371	977,021	34.9%
1962	542,173	1,015,750	34.1%	566,353	1,121,860	32.7%
1963	516,020	987,461	31.6%	549,434	1,112,658	29.8%
1964	507,681	987,374	32.0%	543,582	1,120,794	29.9%
1965	491,253	966,588	31.4%	533,883	1,115,139	29.0%
1966	484,771	977,785	31.3%	529,832	1,134,388	28.7%
1967	472,542	998,989	31.0%	527,954	1,168,109	28.7%
1968	471,069	1,028,149	31.5%	523,489	1,192,240	29.4%
1969	397,608	908,028	32.5%	445,809	1,061,723	30.5%
1970	408,043	965,352	33.6%	461,887	1,127,069	31.5%
1971	405,492	990,087	33.5%	455,268	1,144,795	31.3%
1972	400,196	997,847	33.7%	449,175	1,147,382	31.2%
1973	404,040	1,033,161	33.6%	455,590	1,167,701	32.2%
1974	428,648	1,065,131	41.7%	444,168	1,165,148	37.3%
1975	408,471	1,037,456	43.2%	428,541	1,144,748	38.7%

56a

1976	390,749	1,014,321	43.9%	415,259	1,134,723	38.9%	42.0
1977	374,170	1,008,332	43.3%	391,893	1,121,253	37.8%	41.9
1978	367,060	1,001,403	42.5%	386,458	1,114,903	36.8%	42.0
1979	342,452	983,412	44.9%	362,623	1,101,519	38.7%	42.5
1980	332,292	965,691	45.4%	357,411	1,084,680	40.0%	42.7
1981	327,398	956,670	46.4%	359,796	1,082,608	41.0%	43.0
1982	326,011	966,605	47.7%	361,902	1,093,187	42.6%	43.8
1983	332,767	981,418	47.5%	372,391	1,119,825	42.4%	43.5
1984	331,554	983,624	47.8%	374,148	1,124,028	43.0%	43.4
1985	329,579	997,371	47.5%	371,905	1,139,612	42.4%	44.0
1986	315,362	957,741	48.5%	349,470	1,091,895	42.6%	45.9
1987	357,577	1,093,104	43.0%	387,133	1,274,350	38.2%	42.0%

Notes:

Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter.
 When separate data were reported for different periods within the year, the figure shown is a weighted average.

**Detroit Times* circulation is included in 1960 combined figure.

Source: JX 6.

57a

results for 1986, however, indicate that the Free Press's lead in demographics is vulnerable to competitive pressures.¹¹⁹

c. Circulation and Advertising Revenues

70. Head-to-head competition between two metropolitan newspapers is also measured by circulation and advertising revenues. Of the two, advertising revenues, which are determined on the basis of prices ("rates") paid and the quantity ("linage") sold, is by far the most important source of revenues for both newspapers, accounting for approximately 72% of the Free Press's total revenues and 81% of the News's.¹²⁰

71. The Free Press's circulation revenues (as shown in Table 12) exceeded those of the News mainly because the daily price of the Free Press was 5¢ higher than the price of the News.

72. While the News' lead in advertising revenues has been eroded since 1963, it still is substantial as seen in Table 13.¹²¹ The Free Press' best performance, a 40.6% share in 1983, was followed by two years of decline, followed in turn by only a marginal gain in 1986 which still left it below its 1983 share.

¹¹⁹NX 4K, NX 200Z-5 to Z-6 ¶ 64 (Hall), NX 205A-B, NX 800Z-18 ¶ 71 (Rosse).

¹²⁰NX 100G-H ¶¶ 15-16 (Chapman).

¹²¹The News's discounting policy has been a key deterrent to any substantial advertising gains by the Free Press. See Findings 109-111.

d. Linage

73. In reporting the results of the "linage" (volume of advertising) competition, newspapers traditionally refer to share of run of press advertising ("ROP") which is printed on the newspaper's own presses in contrast to "preprints" or "inserts" prepared by others and merely distributed with the paper. Competition for advertising lineage also frequently refers to "full-run" advertising which is circulated to all of the newspaper's readers in contrast to "part-run" advertising which is only distributed to a portion of the total circulation.¹²² Examples of "part-run" advertising are the ads appearing in a paper's zoned editions, typically news sections of interest to readers in a limited geographic area.¹²³

74. The News leads in daily and Sunday total full-run and full-run ROP lineage as shown in Tables 14-15.

¹²²NX A, p. 28, NX 100J ¶ 21 (Chapman). Full-run advertising produces 85% of the Free Press's advertising revenue, and 87% of the News's revenue. Part-run advertising produces 7% of the Free Press's advertising revenues and 3.8% of the News's revenue. A substantial Free Press lead in part-run advertising was erased by the News between 1985 and 1986. JX 22, JX 25. Preprints account for 8% of the Free Press's revenue and 14.9% of the News's total. NX 613A-B.

¹²³Hall 930; NX A, p. 28. Zoned editions are used by local merchants who have targeted a specific geographic area and therefore do not wish to incur the higher prices charged for reaching the general ("full-run") circulation. NX 100'I'-J ¶ 20 (Chapman).

Table 12: Combined Free Press and News Circulation Revenue (1963-1986) (in thousands of dollars) and Free Press Share (%)

	(Combined Free Press and News Circulation) Revenue)	(Free Press Share) Share)
1963	\$34,546	39.7%
1964	\$23,673	38.9%
1965	\$35,837	39.2%
1966	\$37,169	40.5%
1967	\$34,029	42.6%
1968	\$15,055	45.8%
1969	\$40,841	44.7%
1970	\$43,439	45.0%
1971	\$47,948	48.5%
1972	\$50,869	48.6%
1973	\$50,980	49.1%
1974	\$55,235	49.5%
1975	\$59,502	50.0%
1976	\$67,372	49.8%
1977	\$66,796	50.4%
1978	\$66,608	50.3%
1979	\$67,605	51.1%
1980	\$69,986	52.8%
1981	\$72,343	53.6%
1982	\$74,204	53.6%
1983	\$75,189	53.3%
1984	\$76,901	53.3%
1985	\$87,923	52.6%
1986	\$89,853	51.1%

Note: Data for 1963-1975 are not necessarily consistent from year to year or between the papers due to possible classification or accounting policy differences or changes.

Source: JX 12.

Table 13: Combined Free Press and News Advertising Revenue (1963-1986) (in thousands of dollars) and Free Press Share (%)

	(Combined Advertising Revenue)	(Free Press Share)
1963	\$61,640	30.2%
1964	\$43,037	29.5%
1965	\$74,498	29.8%
1966	\$82,518	30.2%
1967	\$71,498	30.7%
1968	\$34,894	31.6%
1969	\$90,245	31.6%
1970	\$90,388	30.6%
1971	\$97,525	30.6%
1972	\$111,978	31.3%
1973	\$125,246	32.6%
1974	\$130,935	34.8%
1975	\$135,088	35.6%
1976	\$151,942	36.7%
1977	\$172,236	37.1%
1978	\$194,546	37.0%
1979	\$209,928	37.6%
1980	\$207,203	38.1%
1981	\$223,991	38.0%
1982	\$217,879	39.7%
1983	\$234,858	40.6%
1984	\$263,146	39.8%
1985	\$291,225	38.5%
1986	\$312,348	38.9%

Note: Data for 1963-1975 are not necessarily consistent from year to year or between the papers due to possible classification or accounting policy differences or changes.

Table 14
Combined Free Press and News Total Full-Run Advertising Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	53,650,158	29.8%	21,235,374	23.3%	74,885,532	27.9%
1961	42,780,049	36.9%	17,388,823	28.0%	60,168,872	34.3%
1962	39,919,894	36.1%	16,423,917	26.9%	56,343,811	33.4%
1963	45,326,112	36.5%	18,338,800	28.5%	63,664,912	34.2%
1964	31,213,229	36.5%	12,672,403	28.3%	43,885,632	34.1%
1965	55,560,652	36.8%	21,694,501	28.6%	77,255,153	34.5%
1966	58,851,430	36.8%	24,410,692	29.9%	83,262,122	34.8%
1967	49,010,090	37.2%	21,198,908	29.0%	70,208,998	34.7%
1968	22,616,983	36.9%	9,901,032	29.9%	32,518,015	34.8%
1969	54,937,523	37.1%	24,561,062	30.9%	79,498,585	35.2%
1970	49,779,353	36.4%	23,077,868	30.5%	72,857,221	34.5%
1971	49,764,327	35.7%	23,696,481	31.2%	73,460,808	34.2%
1972	54,062,552	37.4%	26,382,736	30.6%	80,445,288	35.2%
1973	57,064,394	38.1%	26,593,908	31.6%	83,658,302	36.0%
1974	54,042,233	39.6%	26,148,107	34.3%	80,190,340	37.9%

62a

1975	56,139,439	40.9%	25,639,040	33.0%	81,778,479	38.4%
1976	63,853,014	43.1%	27,593,982	33.7%	91,446,996	40.3%
1977	65,189,517	42.9%	30,234,470	32.6%	95,423,987	39.6%
1978	69,324,590	42.4%	33,134,916	33.3%	102,459,505	39.5%
1979	68,206,222	42.5%	33,256,755	34.2%	101,462,977	39.8%
1980	61,695,069	40.9%	29,620,754	34.2%	91,315,822	38.7%
1981	57,819,379	42.2%	27,681,404	33.4%	85,500,783	39.4%
1982	51,615,952	43.1%	24,358,538	33.0%	75,974,490	39.9%
1983	51,965,514	43.0%	27,443,123	33.8%	79,408,637	39.8%
1984	54,065,200	42.6%	29,884,914	32.6%	83,950,114	39.1%
1985	59,781,519	40.0%	31,835,866	35.3%	91,617,385	38.4%
1986	63,430,157	39.0%	34,263,156	35.4%	97,693,313	37.8%

63a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Detroit Times lineage is included in Combined Total in 1960.

Source: JX 19.

Table 15
Combined Free Press and News Full-Run ROP Advertising Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA
1971	48,360,503	36.6%	17,700,030	28.1%	66,060,533	34.3%
1972	52,465,024	38.2%	19,446,419	27.4%	71,911,443	35.2%
1973	55,699,476	38.9%	20,870,991	29.2%	76,570,467	36.2%

64a

1974	53,425,529	40.0%	20,724,961	32.4%	74,150,490	37.9%
1975	55,403,219	41.4%	20,855,046	31.2%	76,258,265	38.7%
1976	62,841,419	43.7%	22,511,523	32.4%	85,352,942	40.7%
1977	63,820,339	43.7%	24,359,846	30.5%	88,180,185	40.0%
1978	67,617,434	43.5%	26,984,482	31.5%	94,601,915	40.1%
1979	66,021,504	43.9%	26,875,999	32.7%	92,897,503	40.7%
1980	59,589,106	42.3%	23,800,084	33.4%	83,389,189	39.8%
1981	56,993,543	42.9%	22,824,629	33.1%	79,818,172	40.1%
1982	50,758,516	43.8%	19,333,265	34.7%	70,091,781	41.3%
1983	50,599,054	43.9%	21,324,432	34.7%	71,923,486	41.2%
1984	52,659,798	43.8%	23,098,558	33.4%	75,758,356	40.6%
1985	58,117,023	40.9%	26,026,322	35.2%	84,143,345	39.1%
1986	62,149,421	39.8%	27,158,344	36.5%	89,307,765	38.8%

65a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format.

Source: JX 13.

75. As shown in Tables 14-15, there is no indication of any favorable trend for the Free Press in share of total full-run or ROP full-run advertising lineage. To the contrary, in each year since 1982 Free Press daily share has declined. Slight improvement in Free Press share of total Sunday full-run and Sunday full-run ROP advertising lineage in 1985 and 1986 would appear to be largely a function of how far back the Free Press was to begin with in the Sunday competition as well as the loss of some Sunday circulation by the News in the PMA following the 1985 circulation price increase.¹²⁴

76. Competition for lineage share between newspapers is also broken down by kinds of advertising — "retail", "general", and "classified". "Retail" is displayed advertising from local merchants such as department and grocery stores. "General" (also referred to as "national") is display advertising by national advertisers who promote their brand name products such as cars, cigarettes, and cosmetics on a nationwide basis. "Classified" includes locally placed ads which are listed together and organized by category such as real estate, employment opportunities, and auto sales. Classified and retail advertising constitute "local advertising".¹²⁵

77. Classified advertising is especially important to a newspaper because not only is it a source of revenue, but it also serves as an important stimulus to circulation. A strong classified advertising section attracts readers seeking employment, housing, automobiles and other goods or services. In addition, classified advertisers typically prefer to place their

¹²⁴See Finding 103.

¹²⁵NX A, p. 28, NX 100G ¶ 14 (Chapman), NX 700S ¶ 27 (Morton).

message in the newspaper that carries the most classified advertising.¹²⁶

78. A major News strength is in classified advertising as seen in Table 16.

79. Despite some gains in recent years¹²⁷, Free Press performance in classified advertising has been weak.¹²⁸ Miniscule improvement in Sunday share¹²⁹ would seem to be inevitable considering the large gap between the two papers and is probably attributable to the News's loss of circulation following the 1985 Sunday price increase.¹³⁰

80. The News has the lead in retail advertising. While the Free Press has shown fairly steady progress in Sunday lineage, daily gains have been sporadic as shown in Table 17.

81. National or "general" advertising accounts for only 10% of the News's and Free Press's advertising lineage. There is some indication that national advertisers may turn eventually to newspapers as an alternative to network television but no significant trend in this direction is yet discernible.¹³¹

82. The Free Press, reflecting its out-state circulation strength, has fared well in national advertising lineage as shown in Table 18 which indicates that its share of field has exceeded 50% for each year since 1976.

¹²⁶NX C-1, Appendix I, p. 17, NX 100G-H ¶ 15 (Chapman), NX 700T-U ¶ 29 (Morton). See also Lawrence 2935; IX 99D-E.

¹²⁷AX 504G, AX 505B-C; IX 233.

¹²⁸AX 515E.

¹²⁹IX 207A.

¹³⁰See IX 244.

¹³¹See Morton 2171.

Table 16
Combined Free Press and News Full-Run ROP Classified Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA		
NA	NA					
1963	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA
1971	11,838,080	33.0%	5,941,643	17.6%	17,779,723	27.9%
1972	13,022,783	33.6%	6,957,414	17.3%	19,980,197	27.9%
1973	14,975,227	33.2%	8,095,044	19.6%	23,070,271	28.4%

68a

1974	12,752,495	34.2%	7,835,738	22.6%	20,588,233	29.8%
1975	10,443,111	34.3%	7,316,634	22.3%	17,759,745	29.3%
1976	16,962,632	36.0%	8,464,852	23.8%	25,427,484	31.9%
1977	16,475,421	34.7%	9,171,942	20.1%	25,647,363	29.5%
1978	19,696,445	33.1%	11,058,843	20.8%	30,755,288	28.7%
1979	19,842,488	31.9%	11,667,391	22.5%	31,509,879	28.5%
1980	16,445,477	30.6%	10,071,183	22.8%	26,516,660	27.6%
1981	16,299,056	33.6%	9,302,953	26.4%	25,602,009	31.0%
1982	14,522,681	32.6%	7,662,141	26.7%	22,184,822	30.5%
1983	15,560,265	32.6%	8,494,956	24.8%	24,055,221	29.8%
1984	18,306,796	32.9%	10,911,298	25.1%	29,218,094	30.0%
1985	21,845,159	33.9%	13,062,966	27.9%	34,908,125	31.7%
1986	25,760,480	31.2%	14,140,926	29.7%	39,901,406	30.7%

69a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 17.

e. Financial Condition of the Free Press

83. Prior to 1980, the Free Press was a profitable paper.¹³² Between 1980 and 1986, the Free Press had operating losses of \$56.2 million including the Michigan Single Business Tax and excluding management fees as shown in Table 19.¹³³

84. The Michigan Single Business Tax (MSBT), which is shown in the sixth column of Table 19, is an annual franchise fee which is properly included as an operating expense.¹³⁴

85. On the question of management fees, the Free Press, like other Knight-Ridder newspapers, is from time to time charged a management fee for home office overhead as well as an array of administrative, personnel, computer, communications, accounting, counseling, support, and legal services.¹³⁵ Prior to 1982, the management fee was based on a percentage of the newspaper's profit. Accordingly, the Free Press was not charged a management fee in either 1980 or 1981 because it did not earn a profit in those years. No fee was paid in 1979 although the Free Press earned a small operating profit then. A charge was made in 1978 and the preceding years when the Free Press was profitable. In June 1985, Knight-Ridder determined not to charge management fees for 1984 and 1985, and the Free Press was told to adjust

¹³²The 1968 losses were attributable to a year-long strike. Chapman 1766; AX 515A. The question of the level and disposition of profits for the years 1940-1979 as between Knight-Ridder and the Free Press was not the subject of pre-hearing discovery, nor was this point developed on the record in any meaningful way. See, e.g., Thibault 343-44, 359, 435-36, IX 385A.

¹³³The Free Press's current operating budget anticipates the same operating loss for 1987 as for 1986. See Chapman 1964-65; NX 206A.

¹³⁴NX C-1, Appendix I, p. 40, NX 500L-M ¶ 36-37 (Thibault), NX 600J-L ¶ 32 (Kahn).

¹³⁵NX C-1, Appendix I, p. 47, NX 500M-P ¶¶ 39-46 (Thibault).

its books retroactively to reflect this change. In September 1985, however, this decision was reversed and an estimated management fee was assessed for these two years. But a still different (and lower) figure was pressed in this proceeding on the basis of an accounting device (the so-called three-part test) which KnightRidder and the Free Press had not used for internal purposes.¹³⁶

86. While the services provided for the management fees have value, and the Free Press would undoubtedly have to pay for at least some of these services if it were a stand-alone firm, Applicants did not quantify how much of the management fees represents actual value received by the Free Press or which of these fees the Free Press would have had to incur on a stand-alone basis.¹³⁷ A more stringent accounting of management fees is required given the record evidence that this charge contains a substantial degree of discretion. To illustrate, Gannett charges its newspapers no management fees at all since Neuharth views these services as representative of corporate strength which are more likely to be used (and thereby improve Gannett corporate performance) if they are made available at the discretion of the local paper and without charge.¹³⁸ Moreover, the Free Press's and Knight-Ridder's handling of management fees smacks of slippery accounting which cautions even further against their use: Knight-Ridder's internal accounting system does not report management fees as operating expenses; Knight-Ridder does not take management fees into account in assessing newspaper performance;

¹³⁶Hall 1003-05, 1014, 1069-74; NX C-1, Appendix I, pp. 47-48, NX 6''0'', NX 500''O'' ¶ 44 (Thibault); AX 404A-B; IX 346A-B.

¹³⁷Thibault 279-81. See also Hall 1004-05.

¹³⁸Neuharth 1584-88.

Table 17
Combined Free Press and News Full-Run ROP Retail Linage (1960-1986)
and Free Press Share (%)

	DAILY			SUNDAY			TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA	NA	NA
1971	30,140,955	36.0%	10,293,488	32.3%	40,434,443	35.1%		
1972	32,608,486	38.0%	10,618,241	31.3%	43,226,728	36.4%		
1973	33,976,458	39.7%	10,674,552	33.6%	44,651,010	38.3%		
1974	33,721,185	40.4%	10,800,845	36.8%	44,522,030	39.5%		

72a

1975	37,885,714	42.4%	11,506,992	35.2%	49,392,705	40.7%
1976	38,435,146	45.5%	11,721,961	36.0%	50,157,107	43.3%
1977	39,791,289	45.8%	12,822,631	35.6%	52,613,920	43.3%
1978	41,160,918	47.0%	13,558,179	37.4%	54,719,098	44.6%
1979	39,185,228	48.2%	12,736,297	39.1%	51,921,525	46.0%
1980	36,495,063	45.9%	11,623,094	39.8%	48,118,157	44.4%
1981	34,239,244	45.6%	11,376,827	36.3%	45,616,071	43.3%
1982	29,777,030	47.4%	9,713,412	38.3%	39,490,443	45.2%
1983	29,187,367	47.5%	10,616,432	39.4%	39,803,798	45.3%
1984	27,816,949	48.2%	9,652,445	39.0%	37,469,394	45.9%
1985	28,916,567	43.8%	9,892,347	39.3%	38,808,914	42.6%
1986	29,859,666	44.3%	10,000,330	41.3%	39,859,997	43.6%

73a

Note: 1960-1974 in 8-column format, 1975-1986 in 9-column. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 13.

Table 18
Combined Free Press and News Full-Run ROP General Linage (1960-1986)
and Free Press Share (%)

	DAILY			SUNDAY			TOTAL		
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL
1960	NA	NA	NA	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA	NA	NA	NA
1971	6,381,468	45.6%	1,464,899			41.3%	7,846,367		44.8%
1972	6,833,755	47.5%	1,870,764			42.7%	8,704,518		46.4%
1973	6,747,791	47.1%	2,101,395			43.4%	8,849,186		46.2%
1974	6,951,849	48.8%	2,088,378			46.6%	9,040,227		48.3%

74a

1975	7,074,394	47.2%	2,031,420			41.2%	9,105,814		45.8%
1976	7,443,642	52.3%	2,324,709			45.1%	9,768,351		50.6%
1977	7,553,629	52.3%	2,365,272			43.6%	9,918,901		50.2%
1978	6,760,071	52.6%	2,367,459			47.3%	9,127,530		51.2%
1979	6,993,788	53.4%	2,472,310			48.1%	9,466,099		52.0%
1980	6,648,565	51.6%	2,105,807			48.9%	8,754,372		50.9%
1981	6,455,243	51.7%	2,144,849			45.2%	8,600,092		50.1%
1982	6,447,805	52.2%	1,957,712			48.0%	8,405,516		51.2%
1983	5,851,422	56.5%	2,213,044			50.0%	8,064,467		54.7%
1984	6,536,053	55.1%	2,534,815			47.8%	9,070,868		53.1%
1985	7,355,297	50.6%	3,071,009			52.9%	10,426,306		51.2%
1986	6,529,275	53.1%	3,017,088			52.6%	9,546,363		52.9%

75a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 16.

Table 19
Free Press Selected Financial Information (1963-1986)
(in thousands of dollars)

	Total Oper. Rev.	Total Oper. Exp.	Total Oper. Profit or (Loss)	Mgmt. Fee	Mich. Single Bus. Tax (MSBT) (3)	Revised Total (4)
1963	\$32,561	\$30,390	\$2,171	NA	NA	NA
1964	\$22,108	\$21,508	\$600	NA	NA	NA
1965	\$36,476	\$32,720	\$3,756	NA	NA	NA
1966	\$40,170	\$35,896	\$4,274	NA	NA	NA
1967	\$36,605	\$34,966	\$1,639	NA	NA	NA
1968	\$18,106	\$19,344	(\$1,238)	NA	NA	NA
1969	\$47,010	\$41,858	\$5,152	NA	NA	NA
1970	\$47,443	\$43,716	\$3,727	\$335	NA	NA
1971	\$53,889	\$47,989	\$5,900	\$338	NA	NA
1972	\$60,460	\$55,669	\$4,791	\$490	NA	NA
1973	\$66,639	\$62,420	\$4,219	\$961	NA	NA
1974	\$73,727	\$70,287	\$3,440	\$1,239	NA	NA
1975	\$78,542	\$75,800	\$2,742	\$1,076	NA	NA
1976	\$90,784	\$83,884	\$6,900	\$1,068	\$822	8,790

76a

1977	\$99,075	\$91,553	\$7,522	\$1,227	\$599	9,348
1978	\$106,963	\$102,609	\$4,354	\$1,498	\$521	6,373
1979	\$114,839	\$116,532	(\$1,693)	\$1,773	\$607	687
1980	\$116,095	\$123,459	(\$7,364)	\$2,084	\$658	(\$4,593)
1981	\$125,396	\$136,062	(\$10,666)	\$2,119	\$762	(\$7,785)
1982	\$127,767	\$138,666	(\$10,899)	\$2,315	\$755	(\$7,829)
1983	\$137,058	\$147,680	(\$10,622)	\$2,810	\$807	(\$7,005)
1984	\$147,231	\$159,024	(\$11,793)	\$2,749	\$898	(\$8,146)
1985	\$160,017	\$172,569	(\$12,552)	\$3,327	\$845	(\$8,380)
1986	\$168,310	\$185,281	(\$16,971)	\$3,723	\$717	(\$12,531)

Notes:

1. Data for 1963-1975 are not necessarily consistent nor comparable from year to year or between the Free Press and the Detroit News (see Table 22) due to possible classification or accounting policy differences or changes.
2. Data for 1963-1975 may include operations of business other than the Free Press.
3. No MSBT before 1976.
4. Revised total equals total operating profit (loss) minus management fee plus MSBT.

Source: JX 15.

77a

as indicated in Finding 85 a decision to reverse a previous forgiveness of management fees came about when the JOA application was clearly part of the picture; and while the management fee which eventually was put forward in this proceeding was lower than previous estimates, it was derived from a methodology which was not even used internally prior to the filing of the JOA.¹³⁹

87. Another challenge to the Free Press's accounting came from John Kwoka, an economist retained by the Antitrust Division, who claimed that the expenses incurred for the purpose of improving the Free Press's long-term competitive position (namely, the above-average expenditures of the Tiger plan for 1984-86 which Kwoka's regression analysis put at \$10.3 million¹⁴⁰) are properly treated as capital expenses (and depreciated at an annual rate of 60% for purposes of a JOA analysis.¹⁴¹ While Kwoka's approach finds some support in Applicants' own perceptions of the significance of huge expenditures in the Detroit newspaper war — they are considered "investments" to be returned in future profits¹⁴² — the adjustments he advocated would not only be an extreme departure from any accepted accounting norm for evaluating current operations, but they would only have the effect of reduc-

¹³⁹Hall 1070-74, 1284-88, Chapman 1949-50. It should also be noted that in reporting management fees as part of the JOA process, they have been moved from below the line (a non-operating expense) on the application filed with the Attorney General to above the line (an operating expense) in post-application exhibits. Hall 1017-18.

¹⁴⁰Kwoka 3071; AX 200S-T ¶¶ 38-39 (Kwoka).

¹⁴¹Kwoka 3055-56, 3134; Ax 200A to Z5 ¶¶ 1-60 (Kwoka).

¹⁴²Kwoka's analysis also finds additional support in the notion that circulation obtained through a corporate acquisition (as in the case of the News's acquisition of the *Detroit Times*) is amortized in contrast to circulation "acquired" by promotional efforts. Thibault 317-18, Kahn 727-31.

ing later period profits or increasing later period losses.¹⁴³ Besides, Kwoka's analysis adds little to the record since even with the amortization of the Tiger expenses, Free Press operating losses are nevertheless substantial.¹⁴⁴

88. Questions have also been raised by the Antitrust Division and Intervenor about the reliability for purposes of failing newspaper analysis of the Free Press's non-operating expenses¹⁴⁵ and its balance sheet.¹⁴⁶ These questions relate mainly to the treatment of loans and advances from Knight-Ridder as well as the way that the Free Press's tax loss carryover was handled.¹⁴⁷

89. In connection with the construction of the Riverfront Plant, Knight-Ridder loaned \$41 million to the Free Press. The loan was evidenced by an interest-bearing promissory note. Additional advances increased the principal amount of the loan to \$71 million.¹⁴⁸ In 1985, Knight-Ridder capitalized the \$71 million by removing that amount from the Free Press's long term liability account and adding it to the Free Press's

¹⁴³Thibault 519-24, Kahn 886-87; Kwoka 3112-13, 3140; AX 200C ¶ 7 (Kwoka).

¹⁴⁴AX 200Z-2 to Z-6 ¶¶ 54-62 (Kwoka).

¹⁴⁵When non-operating items (mainly interest expense) are added, the losses of the Free Press for the years 1979-1986 amounted to over \$130 million. NX 603A. See, however, Finding 89 for the handling of interest expense.

¹⁴⁶As of December 31, 1981, the balance sheet of the Free Press reflected a negative shareholder's equity of \$106 million. NX 502E, NX 600'O' ¶ 39 (Kahn), NX 603B.

¹⁴⁷On the question of the amortization of the Riverfront Plant expansion, the Antitrust Division's retained expert, John Kwoka, concluded that the period chosen — 25 years — was "appropriately conservative straight-line depreciation". AX 200Z-1 ¶ 52 (Kwoka). See also NX 6P-S, NX 100Z-35 ¶ 125 (Chapman), NX 200U-V ¶ 46 (Hall), NX 500P-Q ¶¶ 48-49 (Thibault), NX 600M-N ¶ 35 (Kahn).

¹⁴⁸Hall 1122; NX 502N, NX 827A-C.

paid-in capital account with the result that the equity picture of the Free Press was dramatically improved.¹⁴⁹ Knight-Ridder's purpose was to conceal from the News the size of the Free Press's operating losses which could be gauged from the Free Press's rapidly decreasing equity as shown in papers filed with the State of Michigan.¹⁵⁰ In December 1986, "in light of the JOA application", the transaction was reversed¹⁵¹, the loan was again shown as a liability on the balance sheet, and the previously forgiven accrued interest expenses were restored.¹⁵²

90. The tax issue revolves around the treatment of the tax loss carryover. The losses of the Free Press from 1979 to date would have enabled the paper for tax purposes to carry those losses back for three years and to carry them forward as an offset against net profits for 15 years.¹⁵³ The Free Press's financial statements specifically prepared for this litigation do not reflect the potential tax benefit of carrying forward the losses because the Knight-ridder accountant believes that it is improper to reflect the value of a future offset against profits unless the realization of profits is assured beyond a reasonable doubt.¹⁵⁴ The same accounting firm, however, was not nearly as inflexible when it came to preparing pre-litigation internal financial statements. For that purpose, the tax car-

¹⁴⁹Thibault 270-72, 361; NX 502N. At the same time the accrued interest charges (\$26.4 million) were eliminated retroactive to January 1, 1984. Thibault 361-62, 371-75.

¹⁵⁰Thibault 476; AX 405C; see also IX 106E.

¹⁵¹IX 384F. See also Thibault 379.

¹⁵²Thibault 382-83; NX C-1, Appendix I, pp. 49-50; AX 405A-C; IX 383A-C.

¹⁵³Thibault 421.

¹⁵⁴Thibault 417-18, 421, 502-05; NX 828F.

ryover was shown as a reduction in Free Press net losses.¹⁵⁵ Even if this bookkeeping discrepancy had been satisfactorily resolved on the record, which it was not, it would have no impact whatsoever on the operating losses reported in Table 19.

91. To sum up. The flip flops described in Findings 85-86 and 89-90, suggest that the discretionary aspect of the parent-subsidiary relationship lends itself to creative bookkeeping which tends to make the Free Press's balance sheet and P&L suspect.¹⁵⁶ But this cautionary note aside, there can be no

¹⁵⁵Thibault 404-05, 418-19; IX 374B, IX 389L. The same treatment of tax losses appeared in the original JOA application. Thibault 399. There is a related question of whether the tax benefit to Knight-Ridder from Free Press losses is properly carried on the Free Press's balance sheet as an asset or on its P&L as an offset against net losses. Applicant's argument that this may only be done if there is a formal tax-sharing agreement between parent and subsidiary is flimsy (a written agreement is not required and may be inferred, see Thibault 397-98, NX 500J-K ¶ 27 (Thibault)); but given the requirement under NPA that the Free Press should be considered as a stand-alone entity, resolution of this arcane point of federal tax — i.e., when tax benefits may be transferred between parent and subsidiary — is not required. It is fair to assume, of course, that any unused Free Press tax loss carryovers (should they exist) may be taken into an account by any interested acquirer of the Free Press as an offset against future profits. Thibault 422. The record evidence, however, on the question of potential acquisition is so insubstantial that it is unnecessary to speculate about the significance which a potential acquirer would attach to this nebulous asset which, in any event, may already have been used up by Knight-Ridder. See Finding 123 and Thibault 508, 534.

¹⁵⁶To illustrate, the equity-debt reversal described in Finding 89 caused the Free Press balance sheet to show a deficit equity as of December 31, 1986, of \$105,735,000. Had the reversal not taken place, the deficit would have been \$8,393,217 — i.e., \$105,735,000 less the capital contribution of \$70,922,873 and the accrued interest for 1984-86 of \$26,419,000. Moreover, without the reversal, the Free Press's net losses (but not operating losses) would also have been substantially lower because of the elimination of interest expense. Thibault 340, 361-62, 372-75; NX 502E, F, N; IX 383A-C. The use of this sort of discretionary manipulation substantially reduces the reliability of ratios and analyses based on balance sheets and net losses rather than operating losses alone. See, e.g., Thibault 277, 339, Kahn 666, 788, 794-76.

serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses¹⁵⁵, that given its poor financial performance it was unlikely to find funding elsewhere¹⁵⁸, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis.¹⁵⁹ On the other hand, its poor financial performance must be evaluated in the context of a deliberate Knight-Ridder strategy of striving for future market dominance and profitability (or a JOA) at the expense of present profits.

f. Financial Condition of the News

92. The News's financial performance between 1980-1986, as seen in Table 20, was hardly more impressive than the Free Press's.

93. The News had an operating profit in 1985 of \$667,000. This was attributed by News executives to a diversion of management's attention away from the competitive struggle while ENA's stock was "in play" and also to the requirement in the contract of sale to Gannett that certain minimal financial goals be met.¹⁶¹ The record tends to support this odd ex-

¹⁵⁷See Table 19.

¹⁵⁸Thibault 264, 336, 472, 496-97, Kahn 876-79.

¹⁵⁹Thibault 263-64, 284, 392, 472-73; NX 500G, X ¶¶ 19-20, 66 (Thibault), NX 600R-T ¶¶ 48-51 (Kahn).

¹⁶⁰Thibault 307-08, 310-11, 332-34, 495-96, 529-31, 532-33, 550-51, 553; IX 377A. See also Kahn 654, 676, 722-24, 783-84, 900-01, Chapman 2140-43.

¹⁶¹Clark 1357-58; 1360-66; NX 300''O'' ¶ 37 (Neuharth), NX 400 S-T ¶¶ 41-45 (Clark). The 1985 profit may also reflect in part an ENA decision to drop management fees and the Michigan Single Business Tax from News operating charges. IX 269A-B.

planation for a firm's profitability, witness the fact that the advent of Gannett and the return of the News to the fray has produced record losses.¹⁶²

94. Not only will the News's losses in 1987 approximate those of 1986, but there is no end in sight for such losses so long as Gannett and Knight-Ridder persist in maintaining present pricing policies¹⁶³ and do not move to higher prices.¹⁶⁴ The financial condition of the Free Press, summarized in Finding 91, (that is, without funding from its parent, its future as a viable stand-alone entity is in doubt so long as present conditions persist) applies with near equal force to the News.¹⁶⁵ Despite its sharp losses, News management never considered shutting the paper down.¹⁶⁶

95. In Neuharth's view the News's losses represent an investment which will pay off in future profits either in the form of market domination or a JOA. This is Neuharth's "win/win" strategy.¹⁶⁷

¹⁶²Clark 1455-57, Neuharth 1570-72, 1578-79; NX 300J-K ¶¶ 26-28, (Neuharth), NX 400U ¶ 46 (Clark).

¹⁶³Clark 1455-56, Neuharth 1539, 1623-24, 1714-15; NX 100Z-40 ¶ 135 (Chapman).

¹⁶⁴News, ENA, and Gannett officials believed that circulation and advertising rate increases (presumably increases followed by the Free Press) would return the News to profitability. Clark 1418-22, Neuharth 1722-23; AX 558A, E, AX 559A, AX 560A. See also Finding 113.

¹⁶⁵See AX 584 and Neuharth 1624.

¹⁶⁶Clark 1387-89.

¹⁶⁷Neuharth 1617-18, 1625-27, NX 300L-M ¶ 31-33 (Neuharth). See Neuharth 1681-85 for a similar "investment" rationale for the \$400 million pre-tax loss thus far incurred by Gannett's *USA Today*.

Table 20
News Selected Financial Information (1963-1986)
(in thousands of dollars)

	Total Oper. Rev.	Total Oper. Exp.	Total Oper. Profit or (Loss)	Mgmt. Fee	Mich. Single Bus. Tax (MSBT) (3)	Revised Total (4)
1963	\$65,904	\$57,220	\$8,684	NA	NA	NA
1964	\$46,700	\$44,506	\$2,194	NA	NA	NA
1965	\$75,825	\$62,770	\$13,055	NA	NA	NA
1966	\$81,568	\$68,164	\$13,404	NA	NA	NA
1967	\$71,436	\$64,864	\$6,572	NA	NA	NA
1968	\$32,906	\$35,677	(\$2,771)	NA	NA	NA
1969	\$85,529	\$73,057	\$12,472	NA	NA	NA
1970	\$87,978	\$78,480	\$9,498	NA	NA	NA
1971	\$93,620	\$84,380	\$9,240	NA	NA	NA
1972	\$104,347	\$93,724	\$10,623	NA	NA	NA
1973	\$111,339	\$107,452	\$3,887	NA	NA	NA
1974	\$113,915	\$108,465	\$5,450	NA	NA	NA
1975	\$117,331	\$108,601	\$8,730	NA	NA	NA
1976	\$129,928	\$120,280	\$9,648	\$1,584	\$1,706	\$12,938

84a

1977	\$141,213	\$128,576	\$12,637	\$1,374	\$1,509	\$15,530
1978	\$155,574	\$143,866	\$11,708	\$1,786	\$1,551	\$15,045
1979	\$164,028	\$151,996	\$12,032	\$1,989	\$1,654	\$15,675
1980	\$160,930	\$161,210	(\$280)	\$2,288	\$1,154	\$3,162
1981	\$171,865	\$180,094	(\$8,229)	\$2,616	\$1,455	(\$4,158)
1982	\$164,380	\$178,060	(\$13,680)	\$2,811	\$1,415	(\$9,454)
1983	\$172,866	\$184,373	(\$11,508)	\$2,817	\$1,407	(\$7,284)
1984	\$192,426	\$200,733	(\$8,307)	\$2,931	\$1,765	(\$3,611)
1985	\$218,053	\$222,439	(\$4,386)	\$3,291	\$1,762	\$667
1986	\$229,630	\$242,864	(\$13,234)	\$573	\$0	(\$12,661)

Notes:

1. Data for 1963-1975 are not necessarily consistent nor comparable from year to year or between the Free Press and the Detroit News (see Table 21) due to possible classification or accounting policy differences or changes.

2. No MSBT before 1976.

3. Revised total equals total operating profit (loss) minus management fee plus MSBT.

Source: JX 5.

85a

B. The Prospects For The Free Press

96. The Attorney General directed that a record be made respecting several alternative scenarios — an economic upturn in the Detroit market, price increases, cost savings, market segmentation — which could conceivably return the Free Press to profitability. The prospects for each of these conditions are considered in Findings 97 to 121.

1. The Detroit Economy

97. The record presents a mixed picture of how far Detroit has progressed from the depths of the deep recession of 1979-1984. By the end of 1984, total employment in the Detroit metropolitan area had rebounded nearly 6% from its low point in 1983 and stood at 93.2% of its level in 1979.¹⁶⁸ In 1986, however, there were still additional setbacks in the auto industry.¹⁶⁹

98. As for predicting the long-range prospects of Detroit, the record on this point (consisting of whatever gloomy or sanguine statistical scrap either side could dredge up but all unaccompanied by any persuasive expert opinion compelling a choice in either direction¹⁷⁰) does little to resolve reservations about even attempting to litigate over this sort of guesswork. What the record clearly does show, however, is that even under the most modest assumptions about the future of the area, the huge Detroit newspaper market (valued at over \$300 million) is a choice plum. As Free Press planners put it —

¹⁶⁸NX 870A-H. See also 1X 165A.

¹⁶⁹NX 100Z-11 ¶ 75 (Chapman), NX 400J ¶ 21 (Clark), NX 700Z-10 to Z-11 ¶ 59 (Morton).

¹⁷⁰Compare IX 211C-D, IX 400C, E-F ¶¶ 4, 7 (Young), IX 404AB, IX 405C-P ¶ 4-29 (Johnson), IX 406A-G, IX 407, IX 408A to Z13, IX 409A-P, IX 519A to Z-3, with Rosse 2492-96, NX 3A-B, K, NX 700Z-10 to Z-13 = ¶ 59-63 (Morton), NX 800Z-29 to Z-30 ¶ 94 (Rosse), NX 868A-B, NX 872A to Z-12.

THE DETROIT MARKET

Detroit, the nation's fifth largest market, has already grown to where many of the so-called "growth markets" want to be.

For instance:

Population	5th	4.3 million
Households	5th	1.6 million
Effective buying income	5th	\$46 billion
Total retail sales	4th	\$22.8 billion

The suburban Detroit market, with three million residents, is second only to Los Angeles in population. The effective buying power of suburban Detroit is fourth in the nation at \$35 billion.¹⁷¹

2. Increased Revenue

99. Apparently confident that the opening of the Riverfront Plant would soon give it the circulation lead (and with the objective of recouping in part the capital outlay for the project) the daily price of the Free Press was increased from 15¢ to 20¢ in 1979. To this day, the News has not followed this price increase because it fears loss of the circulation lead if the papers

¹⁷¹AX A, p. K 001791. See also AX 570Z-3 ("the market represents one of the most promising long turn newspaper 'turfs' available"), and AX 503B-D, AX 504C, IX 22D-E, IX 51C, IX 96D, IX 161H, IX 255A-B. Only one larger metropolitan area (Philadelphia) does not now have two competing newspapers, and several markets smaller than Detroit support newspaper competition. AX 1A, AX 2E. The evaluation cited in the text of this finding followed an assumption "That the economic climate will remain about the same. Though some short-term fluctuation will occur, in the longer term we anticipate that while the decline probably has bottomed out, we likely won't see any significant growth in the marketplace for the foreseeable future." AX A, p. K 001793.

sold at the same price.¹⁷² Other significant price moves were as follows:

In 1983 the News raised its out-state price to 20¢, matching the Free Press's out-state price.¹⁷³

The prospect of increasing losses from Tiger II, apparently inspired a January 6, 1985, Sunday price increase by the Free Press from 50¢ to 75¢. The News followed on April 7, 1985.¹⁷⁴

On March 31, 1986, the News reduced its daily out-state price from 20¢ to 15¢. The Free Press followed the News's lead on the same date.¹⁷⁵

On May 18, 1987, the News raised the daily copy price in the out-state area to 20¢. The Free Press followed this lead on the same day.¹⁷⁶ This increase alone was projected by the

¹⁷²Clark 1382, 1385, 1504-05, Nelson 3384-87; NX 400G ¶ 14 (Clark), NX 852F; IX 35C, IX 139A. The Free Press's weekly subscription price in the CZ and RTZ is \$1.90 compared to the News's \$1.65. Clark 1382-83; NX 6A, NX 200Z-10 ¶ 74 (Hall), NX 800Z-48 ¶ 137 (Rosse); AX 9A; IX 139A.

¹⁷³Clark 1353.

¹⁷⁴NX C-2, Exhs. 9.a, 9.b, NX 400Z-3 ¶ 62 (Clark). There is evidence that the Sunday price increase had a tactical component too. By increasing its Sunday price the Free Press wished "to force the which-paper-to-buy Sunday issue (based on the assumption fewer people will buy two Sundays if the price goes to \$1.75)." IX 314A. This Sunday price increase was projected by the Free Press to produce additional revenue of \$5,570,321 (IX 88B) and while it added revenue to the Free Press's bottom line (Lawrence 2939), the drop in overall Sunday circulation of both papers following the increase reduced the gain in income below the projected amount. NX A, p. 62; IX 150C, Q, IX 258, IX 302A. See also Chapman 1954, IX 155A. It should also be noted that any increase in circulation prices is only partially credited to the newspaper because some of the added revenue must be passed on to distributors. Hall 1261; IX 46.

¹⁷⁵NX 200, Z-13 ¶ 81 (Hall); AX 503P, AX 555.

¹⁷⁶Lawrence 2880; NX 200N ¶ 31 (Hall).

Free Press to reduce its operating loss by over \$543,000 for the balance of 1987.¹⁷⁷

100. The daily prices in Detroit (20¢ for the News and 15¢ for the Free Press) are probably the lowest in the United States.¹⁷⁸

101. In addition to low cover prices, both papers have discounted sharply to promote circulation. The News despite its cover price advantage has used discounting more aggressively in order to maintain its circulation lead.¹⁷⁹

102. While Free Press management has expressed the belief that it "can endure and regain more quickly from pricing [increases] than the News"¹⁸⁰ (and there is some support in the record for this view since the Free Press has largely maintained its nearly equal total daily circulation notwithstanding its higher price¹⁸¹) the Antitrust Division and Intervenor did not seriously challenge the evidence showing that future profitability could not be accomplished by any additional circula-

¹⁷⁷AX 554. See also NX 200Z-13 to Z-14 ¶ 81 (Hall).

¹⁷⁸Neuharth 1687-88, Chapman 1957; AX 2A-E, AX 3A-B, AX 515B, AX 572C; IX 173C, IX 255Q, IX 461A-B. The 75¢ charge for the Sunday papers is also among the nation's lowest Sunday prices. AX 579D.

¹⁷⁹Hall 1164-66, Clark 1383-84, 1395, 1436, 1465-66 Morton 2241-42, Rosse 2453-54; NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 503G, AX 515B, AX 529B-C, AX 564B-C, AX 581C; IX 52B, IX 96B, IX 214A, IX 221, IX 272A-D, IX 312F, IX 342B, IX 355. Interestingly, it is the paper which is faced with the prospect of entering the "downward spiral" (see Finding 128) which traditionally has been the heaviest discounter. Morton 2245, Rosse 2455. Circulation discounting is generally frowned upon by advertisers who feel that it only produces casual readers. Rosse 2455. See also AX 504N, O.

¹⁸⁰AX 503H; see also IX 189, IX 212C, IX 258.

¹⁸¹See, e.g., Morton 2273, Lawrence 2850; AX 505A-G; IX 212A, IX 272A. Free Press sponsored market research, however, indicates that actual price sensitivity for both papers is about the same. IX 198Z-15.

tion price increases by either the Free Press or the News which is not followed by the other.¹⁸²

103. Prior to the Gannett acquisition, the Free Press and Knight-Ridder had little basis for expecting that ENA would oblige the Free Press by either following or initiating any additional circulation price increases.¹⁸³ While a daily price increase was briefly considered by the News in 1985 following the Sunday increase¹⁸⁴, the Sunday price increase itself was regarded as a mistake by News's management since it may have had the effect of diminishing the News's lead (in both daily and Sunday circulation) and thus was contrary to the News's overall strategy of seeking domination through low circulation and advertising prices.¹⁸⁵

¹⁸²While the record does not establish the precise demand elasticities of the Detroit newspaper market, it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses including perhaps discounts off the increased circulation price. A loss of circulation may in return require a reduction in advertising prices because of the effect on milline rates. Hall 1261, 1265, Clark 1385, 1433-34, Chapman 1868-89, 1958-59, 1962-63, Rosse 2617, 2699-2700, Morton 2355-57, Lawrence 3024-26, Simon 3240-41, 3243-44, Nelson 3382-84; NX 100Z-43 to Z-46 ¶¶ 141, 143-48 (Chapman), NX 200Z-10 to Z13 ¶¶ 75-79, 81 (Hall), NX 700Z-37 to Z-39 ¶¶ 102-105 (Morton), NX 800Z-51 to Z-53, ¶¶ 144, 146 (Rosse); IX 79A, IX 96D, IX 88B, IX 99Z-33. Of course the best proof of the lack of Free Press pricing flexibility is shown by its inability in the face of substantial losses to increase daily prices because of apprehension over the adverse circulation effect. See, e.g., IX 92A-B.

¹⁸³Clark 1425-26, Nelson 3368, 3373, 3382-87, 3391; AX 501H, AX 515B-C, AX 556. It is virtually certain that the Free Press would have followed any News price increase. Hall 1315; AX 504U.

¹⁸⁴AX 557A-M; IX 162W.

¹⁸⁵Clark 1353-54, 1385, 1394-96, 1436, 1458-63, 1504-05, 1511-13, Nelson 3401, 3403-05; NX 400Z-3 ¶ 63 (Clark); IX 96B, IX 155A-D.

104. Free Press and Knight-Ridder management had good reason to anticipate a more accommodating pricing policy from Gannett given Gannett's well-recognized reputation for charging at least 25¢ and in many cases 35¢ for its papers¹⁸⁶. Moreover, Neuharth had predicted that total readership of the two Detroit papers would continue to increase "even if, or maybe especially if, they make it more convenient for the public to drop a single coin like a quarter into a vending machine rather than two dimes or a nickel and a dime."¹⁸⁷

105. Notwithstanding Free Press expectations and Neuharth's intimations of a price increase, Gannett's first action in arriving in Detroit was to lower its price out-state (where the Free Press is dominant) from 20¢ to 15¢. This shot across the bow impressed on Knight-Ridder the high cost of head-to-head competition with Gannett and the desirability of a JOA.¹⁸⁸

106. Gannett pricing strategy was also motivated by the realization that any increase in circulation price might jeopardize the JOA by putting the Free Press into the black.¹⁸⁹

¹⁸⁶Hall 1030-31, Neuharth 1689-90, Morton 2182, 2184-85, 2327-29, 2343-44, Lawrence 2875, 3014-15; AX 503N-"O", AX 504F, U-X, AX 505A-B, AX 553A, AX 572C, AX 581A-D; IX 173C, IX 197A. See also Chapman 1959, 2006-07.

¹⁸⁷IX 572D. Neuharth told the Detroit Press club that underpricing their newspapers is one of the biggest mistakes made by publishers. AX 572C-D. See also IX 165B.

¹⁸⁸Neuharth 1524-25, 1712-13, Chapman 1902-03; AX 503N-P; IX 241, IX 345A.

¹⁸⁹IX 167A, IX 235B. As early as August 1985, Gannett officials were sensitive to the effect on JOA prospects of any price increase which could return the Free Press to profitability. Gannett was also concerned that any pause in News discounting could move the Free Press into the circulation lead. Neuharth 1687; IX 167A.

107. Neuharth and other Gannett officials testified that without a JOA they will not raise circulation prices since they intend to maintain pressure on the Free Press as they seek market domination.¹⁹⁰ This strategy received the endorsement of Applicants' retained expert.¹⁹¹ But Gannett officials and retained expert never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies.¹⁹² As it happens, contemporaneous evidence indicates that absent a JOA Gannett may eventually initiate circulation price increases as the way to return the News to profitability.¹⁹³

108. In addition to circulation prices, the Detroit newspaper war has been bitterly fought in the advertising price sector. Newspapers typically publish their advertising prices in "rate cards". These rate cards generally establish different rates per line for different types of advertising and provide reduced rates for larger quantities. In addition, combination rates are offered for purchases of space in multiple issues or sections such as daily-Sunday or part-run—full-run combinations.¹⁹⁴

¹⁹⁰Neuharth 1617-18, 1738-39, 1748, Nelson 3411-13; NX 300F-G, J-M, S-T ¶¶ 16-18, 26-28, 31, 33, 44-45 (Neuharth). See also IX 256B.

¹⁹¹Morton 2182.

¹⁹²See Clark 1355, Neuharth 1687, 1714-15, Chapman 1969-70, Rosse 2385, 2465-67, Nelson 3367-69, 3434-35; NX 100Z-40 ¶ 135 (Chapman).

¹⁹³AX 557A, AX 558E, AX 559A, AX 560A; IX 165B, IX 169B.

¹⁹⁴NX 100J-K, M ¶¶ 22-23, 28 (Chapman), NX 201A-P, NX 202A-L, 203A-H, NX 837. In addition to consulting rate cards, advertisers are interested in the "milline rate", that is, the cost of reaching a million households with a line of advertising. NX 100K-L ¶ 25 (Chapman), NX 700V-W ¶¶ 33, 34 (Morton). While the News's milline rates in the PMA were consistently lower than the Free Press's (NX 700Z-2 to Z-23 ¶¶ 77-78 (Morton), NX 800Z-48 to Z-49 ¶ 139 (Rosse), NX 822A-D)) the Free Press rate is lower based on total circulation. AX 534F.

109. Detroit advertising rate cards bear little resemblance to the actual prices paid. And while the published rates of the Free Press and the News have increased each year since 1976¹⁹⁵, severe discounting is rampant at both papers to the point that Detroit newspaper advertising rates are among the lowest in the nation.¹⁹⁶ Discounting of advertising rates has severely impacted on Free Press and News profits.¹⁹⁷

110. There is no convincing evidence that the Free Press, without regard to the News's reaction, could increase its advertising revenue by adhering to published rates (i.e., by refusing to discount).¹⁹⁸ The record indicates that any attempt by the Free Press to increase unilaterally the price of advertising would result in still further erosion of its share of lineage, which would give the News additional circulation, a still lower milline rate in the PMA, and greater attraction as a duplicate buy.¹⁹⁹

¹⁹⁵Hall 1092, 1270, Lawrence 3022-23; NX 200Z-14 to Z-15 ¶ 83 (Hall), NX 617A-B; IX 35D.

¹⁹⁶Clark 1373-74, 1376, 1395, 1467-68, Chapman 1953, 2065, Lawrence 2964, Nelson 3368, 3373; NX 100J-K ¶ 23 (Chapman), NX 200Z-16 to Z-17 ¶ 86 (Hall), NX 800Z-48 ¶ 138 (Rosse); AX 503E, AX 504D, AX 534C-F, AX 538A-B, AX 539A, AX 541A, AX 546A-B, AX 581C; IX 164A, IX 219, IX 256B, IX 361.

¹⁹⁷AX 503E, AX 534A; IX 219.

¹⁹⁸Clark 1373, Neuharth 1539, Lawrence 2882-83, Nelson 3434; NX 100Z-48 ¶ 152 (Chapman), NX 200Z-14 to Z-18 ¶¶ 83-88 (Hall), NX 700Z-20 to Z-23, Z-38 to Z-39 ¶¶ 76, 78, 104, 105 (Morton), NX 800Z-48 to Z-49, Z-52 to Z-53 ¶¶ 138-39, 145-46 (Rosse); AX 546A-B.

¹⁹⁹Hall 1272, Chapman 1961-62, Morton 2355-61; NX 100Z-48 ¶ 152 (Chapman), NX 200Z-14 to Z-18 ¶¶ 83-88 (Hall), NX 400Z-4 to Z-5 ¶ 66 (Clark), NX 700Z-20 to Z-23, ¶¶ 76-78 (Morton), NX 800Z-48 to Z-49 ¶ 139 (Rosse); AX 534F, AX 536A. Similarly, estimates made by the News's staff showed that the News could not unilaterally adhere to rate card prices. AX 546A-B. See also Clark 1373-74 for evidence that in the face of Free Press discounting, the News had to discount in order to hold on to the lineage lead.

111. It is also clear that at least prior to the Gannett acquisition there was no inclination at the News to give the Free Press breathing space in the form of a News-initiated cease fire in the advertising discount phase of the Detroit newspaper war.²⁰⁰ On the contrary, despite the prospect of deep losses for each year since 1981, the News resisted any advertising price increases (in the form of a return to rate card prices) as part of its strategy of achieving market domination or alternatively the negotiation of a favorable JOA.²⁰¹ Gannett has thus far followed a similar policy which has been summarized by a News executive as "no thought to have realistic rate card pricing *now*".²⁰²

112. Free Press executives stated that neither the News nor the Free Press is likely to initiate an advertising price increase because their pricing flexibility is limited by competition from other media.²⁰³ This testimony is entitled to no weight. For despite competition from other media (and the possibility of some loss of advertising to these competitors if rates are increased) it is virtually certain that advertising prices for the combined Free Press and News will increase if JOA is approved.²⁰⁴ Besides, newspapers outside of Detroit, which charge much higher advertising rates than the Free

²⁰⁰Clark 1394-96, Nelson 3409-10; NX 400Z-4 to Z-5 ¶ 66 (Clark).

²⁰¹Hall 986, Clark 1371-74, 1394-96, Nelson 3367-69, 3373, 3409-10. The News's strategy can be justified in terms of the positive effects on the Free Press of an advertising price increase. Free Press executives estimated that if advertising rates in Detroit were to become consistent with other markets, this would generate \$14 million for the Free Press and return it to profitability even without a circulation price increase. AX 534A.

²⁰²IX 256B. See also Neuharth 1528-30, 1617-18, 1633, 1738-40, IX 274B.

²⁰³Hall 1092, 1270, Lawrence 3017.

²⁰⁴See Finding 117.

Press or the News, are flourishing, reflecting generally the perception of many advertisers that newspaper advertising represents a unique method of conveying commercial messages.²⁰⁵ As it happens, Detroit, in contrast to other metropolitan areas, is characterized by relatively little effective competition from suburban papers which suggests that there is less not more pressure on Applicant's advertising rates than exists elsewhere.²⁰⁶ As for the contention that Gannett has no incentive to increase advertising prices since it is in a "win/win" situation (that is, it will either gain dominance and future profitability or a JOA on the basis of the Free Press's poor financial performance²⁰⁷), this argument fails to take into account the record proof that neither paper can gain profitability if the JOA is denied and present pricing practices continue.²⁰⁸

113. Contemporaneous evaluations indicate that at higher circulation and advertising prices, Detroit can sustain two profitable newspapers. The record shows the following:

²⁰⁵Newspapers have generally performed impressively against other media in recent years. After suffering a sharp decline following the initial growth of television, newspaper advertising is now growing faster than either television or radio. See Chapman 1989, 1992-93, Morton 2165-73, Rosse 2601-02; NX A, pp. 8, 11; AX 578B-C; IX 131E. Many advertisers favor newspaper advertising because it requires a purchase, it allows for instantaneous changes in content, and it passes from hand to hand to all the persons in a household. Morton 2221-23, Lawrence 3021-22; NX 700X ¶ 37 (Morton). See also IX 131E.

²⁰⁶Rosse 2597-99; NX 816A-K; AX 509B; IX 22A.

²⁰⁷See Finding 95. See also IX 395A for ENA's articulation of a similar policy.

²⁰⁸See finding 107. Note, moreover, that Neuharth "did not preclude [an advertising increase] in the normal course of business". Neuharth 1740. See also Neuharth 1699-1701, 1705-06, 1709-1722, and IX 170A-H for evidence that even without a JOA, Gannett may eventually have to move to higher prices in order to justify the ENA acquisition and to prevent dilution of corporate earnings with the adverse effect this would have on Gannett common stock.

In September 1982, the Free Press projected profits on the basis of a circulation price increase alone.²⁰⁹

In August 1985, Free Press management stated that —

... if competitive pricing becomes rational and consistent with other markets around the country the Free Press would have generated another \$14 million in advertising for the year 1985. We would have been profitable without a circulation price increase.²¹⁰

In an October 1985 presentation to Knight-Ridder executives, Free Press management sized up the Detroit market as follows:

We are structuring this process in terms of action by the News and reaction by the Free Press for two basic reasons: First, the News is the current unit leader in our market. Second, one of the prerequisites to returning to profitability — for both newspapers — is restoring rational pricing in the market. Within the limits of the law and sensible business practices, we would hope the News would adopt more realistic (meaning higher) prices in both advertising and circulation. Looked at another way, our reactive posture actually will be a pro-active strategy.²¹¹

²⁰⁹AX 514A. On the other hand, Chapman predicted losses of almost \$40 million in the following four years if circulation prices were not increased. AX 514B.

²¹⁰AX 534A. See also Hall 1091.

²¹¹AX 504U. The Free Press calculated that if it increased its daily price to 25¢, it would result in an increase in monthly operating profit of \$550,000 while each 5¢ increase in the price of the News would increase its monthly profit by \$575,000. AX 504V. At the same time it was estimated that a Sunday price increase to \$1.00 would result in a monthly increase of operating profit for the News of \$711,000 and \$603,000 for the Free Press. AX 504W.

In March 1986, Free Press management declared "If you recast 1985 with the Free Press at 25¢ daily and \$1 Sunday, our bottomline picture would have improved by \$13 million."²¹² The same planning document connected profitability to an annual 8% increase in advertising rates.

The five year forecast for the News (drawn up in March 1982 at the height of the auto industry depression) projected profits of \$3.7 million by 1984 if there were circulation and advertising price increases.²¹³

Applicants' retained expert, John Morton, said in November 1983 that "Both newspapers in Detroit were profitable until 1980, and both could make money now if circulation prices were higher".²¹⁴

In 1983, the ENA Vice-President for finance projected from an economic model that under conditions of "normalized competition," the Free Press would earn \$1.5 million per year and the News \$5 million.²¹⁵

In August 1985, Gannett was informed that by increasing the daily price of the News to 20¢ it could increase operating income by nearly \$4 million per year and "put The News in the black in 1986 with an operating income of \$2,171,000".²¹⁶

²¹²AX 503G-H. The January 20, 1986, draft budget of the Free Press projected a sharp reduction in Free Press losses on the basis of a daily circulation price increase to 25¢. Hall 1088, 1318-19; AX 553A. Cancellation of this price increase was estimated to have cost the Free Press \$4.3 million. IX 231E-F.

²¹³Clark 1418-22; IX 36A to Z-35. The cost to the News of maintaining a 15¢ cover price has been estimated at \$7 million a year since 1979. AX 501H.

²¹⁴Morton 2370-71.

²¹⁵IX 72H.

²¹⁶IX 162W. See also IX 165B.

In still another August 1985 assessment (characterized as "too optimistic"), Gannett officials projected that if the daily price increased to 25¢ in January 1986 and then 35¢ in January 1987 (with the Sunday paper at \$1.00) profits would be \$7.2 million in 1986, \$21.7 million in 1987, and \$26.4 million in 1988.²¹⁷

114. Beyond the generalizations noted in Finding 113, Intervenor and the Antitrust Division presented no economic model showing the level of circulation and advertising prices required to return the Free Press and News to profitability or how these price increases would impact on demand functions. Since the Free Press is already at 20¢ for its daily paper, any revenue it can reasonably anticipate from a daily circulation increase (i.e., to 25¢) might not be a guarantee of profitability.²¹⁸ Speculation about an additional increase in Sunday circulation price seems perilous at best given the poor consumer reception in 1985 when both papers increased cover prices from 50¢ to 75¢. Based upon these considerations, it is fair to assume that if a JOA application is denied the Free Press and the News will have to consider market strategies that would allow for an increase in both circulation and advertising prices in order to bring them well into the black.²¹⁹

115. If circulation and advertising prices do not increase, Detroit cannot sustain two profitable papers as shown in the financial results reported in Findings 83 and 92 and the following:

²¹⁷AX 558A, E. See also AX 559A and AX 560A for similar assessments in September and December 1985. Free Press management had reached conclusions which substantially agreed with these News projections. IX 315A-C.

²¹⁸See AX 504V-W, IX 46, IX 99L for the wide range of possible revenue gain from a circulation increase.

²¹⁹See Hall 1091, AX 534A, IX 35C.

In a December 1981 assessment which took into account "the unpredictability of the Detroit News primarily as it relates to their willingness to incur substantial operating losses through wholesale discounting to advertisers and through circulation promotion and pricing policies"²²⁰, Free Press planners concluded:

... we cannot let our assault on the News' lead be anything less than sustained. The sense is more widespread than ever that the conditions of metropolitan dailies in general and the Detroit economy in particular have changed in some basic ways. We can no longer count on the long-range prosperity of two 600,000-plus-circulation daily newspapers in this city. The recent examples of the Washington Star, the Philadelphia Bulletin, the New York Daily News are sobering. And economic forecasts indicate the economy of Detroit and southeastern Michigan is in for a long and painful readjustment as it struggles toward diversification while its current base, the auto industry, sorts out some fundamental changes.²²¹

In March 1982, the Free Press's future profitability was directly linked to increased circulation rates²²², and in October of that same year, a Free Press executive concluded that so long as the News continued its policies (low circulation prices and advertising rate discounts) "I do not see how two newspapers in this market will ever show a profit".²²³

²²⁰IX 26C.

²²¹IX 26Z-77. The same thoughts were expressed in September 1982. IX 27B. See also Clark 1398-99 for similar views at the News about Detroit's inability "to sustain two major daily newspapers in competition."

²²²NX 852J.

²²³AX 508C. See also IX 35C, IX 42A, IX 55B.

In September 1983, Free Press planners concluded that without a JOA there could be no profitability in Detroit because of advertising rate discounts and resistance to circulation pricing action.²²⁴

116. Marilyn Simon, an economist on the staff of the Antitrust Division and a knowledgeable student of the newspaper industry, testified that she knows of no independent action, either in the form of unilateral price increase or otherwise, that could return the Free Press to profitability.²²⁵

117. If the JOA is approved, it is a virtual certainty that both circulation and advertising prices of the combined Free press and News will increase.²²⁶ The profitability of the JOA is premised on just an increase.²²⁷

3. Lower Costs

118. The record does not show that the Free Press has aggressively pursued a cost-cutting strategy even though strin-

²²⁴IX 75A.

²²⁵Simon 3243-44.

²²⁶Neuharth 1621, Chapman 2066, 2069-70, Morton 2289, Rosse 2593, Lawrence 3022-23; IX 280A. Chapman believes that even with higher advertiser rates under the JOA, this will be a good buy for advertisers. Chapman 2062-72.

²²⁷AX 305A-C, AX 558E; IX 169A-E, IX 170A-H, IX 176B-C, IX 220A-G. The JOA will also profit from lower costs attributable to plant closings and lay-offs. AX 558A-F. However, by far the largest cost savings will come about as a result of the anticipated drop in combined circulation which will result in a substantial "newsprint savings." IX 165H. The same savings presumably would be available should circulation decline following a price increase without a JOA. See IX 46. If there is any fall-off in circulation following a JOA price increase, it is estimated that it would approximate the circulation decline following any News and Free Press price increase without a JOA. Rosse 2749.

gent budgetary restraint has been the hallmark of survival by metropolitan papers engaged in a head-to-head competitive struggle.²²⁸ The Free Press has never been required to implement a budget cut.²²⁹ Moreover, in planning the various Tiger initiatives Free Press and Knight-Ridder executives assumed that during the struggle for dominance (or alternatively a favorable JOA) expenditures (and losses) would continue to mount while cost-cutting was not to be actively pursued.²³⁰

119. The question of how much room there actually is for cost-cutting was largely avoided by both Intervenor and the Antitrust Division. The largest expenses incurred by the Free Press are labor and employee benefits amounting to 48% of the paper's total operating revenue.²³¹ Any attempt at savings in this area is bound to run up against union opposition. As John Morton, Applicants' retained expert, observed in August 1985:

Strong labor contracts would make sharp cost cutting quite difficult. And as long as a JOA were being considered as a possibility somewhere down the road, both papers might be loath to cut costs or raise prices too swiftly, because any sustained move toward profitability could haunt them during the eventual JOA hearings in which one or both papers would plead for relief from uncontrollable losses.²³²

²²⁸Hall 1220, Morton 2215-16, Rosse 2462; IX 55B, IX 364H, Z to Z3. Another tack followed by cost-conscious papers is to eliminate circulation that adds to total figures but is not prized by advertisers, i.e., so-called "ego circulation". See Rosse 2753-54, AX 559B.

²²⁹Hall 1142-43, Lawrence 2896-98.

²³⁰Hall 926, Morton 2321-22; AX 515A-F; IX 161Z-21 to Z-24, IX 110A.

²³¹NX 100Q-R ¶ 37 (Chapman).

²³²AX 581C. See also Hall 1083-84, 1220.

120. Intervenors in particular presented a feeble case for making any assumptions about cost-cutting. While they cite the fact that the Free Press's labor expenses as a percent of revenue increased at a faster rate than the News's comparable expenses²³³, these major Detroit area newspaper unions presented no testimony in elaboration of the Free Press's view that recent labor negotiations presented "a great opportunity to reduce or eliminate any inefficient work practices and contract provisions that restrict the effective utilization of our employees"²³⁴ or Gannett's view that Detroit offered some good opportunities for "taking on the unions" in order to reduce costs.²³⁵ As far as this record will allow, the Detroit unions have simply not been willing to accept less than the wages and benefits offered by metropolitan papers in other areas, and accordingly there is no basis for speculating about the possibility of cost savings in this area without a JOA.²³⁶

4. Other Strategies

121. Intervenors and the Antitrust Division have suggested that the Free Press could possibly carve out for itself market segments based on either geography or demographics which could assure profits. If a city's population is large enough there may be a potential for segmentation to occur within a single

²³³NX 603A, NX 615A. See also IX 316A, IX 465, IX 466.

²³⁴IX 99Z-125. See also AX 550A-F.

²³⁵IX 170A.

²³⁶Hall 1256-57; IX 84G. See also Hall 1231, 1258-59, Chapman 1963-64, Morton 2279-80, NX 700Z-35 ¶ 99 (Morton). There are other labor issues in the Detroit newspaper industry which are clearly beyond the scope of this proceeding such as union opposition to joint bargaining by the Free Press and the News on economic issues (Hall 1254-55, Nelson 3380; IX 191A-D) and a dispute as to union access to the newspapers' books. Nelson 3380-81; IX 84A-E.

metropolitan area. But even in the largest cities such segmentation has been rare and there is no evidence that geographic segmentation is feasible in Detroit.²³⁷ As for the possibility of emulating the *New York Times* and attempting to achieve demographic segmentation based on isolating "up-scale" readership, this is even more difficult to achieve than geographic segmentation, and even an attempt to skew a paper toward a particular segment of the population could result in a loss of general readership. In any event, there is no evidence that such a strategy would succeed in Detroit notwithstanding some indication that from time to time the Free Press has enjoyed better demographics than the News.²³⁸

122. Intervenors have also argued that there may be available to the Free Press alternative forms of financing should Knight-Ridder decide to discontinue its largess. There is no support in the record for this proposition.

123. The question of a possible acquisition of the Free Press came up late in this proceeding. On August 4, 1987, Knight-Ridder received an inquiry about a possible sale of the Free Press to the publisher of the *Chicago Sun-Times*, the junior Chicago paper which had just completed the most successful year in its history.²³⁹ Whether or not this is a serious offer

²³⁷NX 100Z-3 to Z-6 ¶¶ 59, 63 (Chapman), NX 200D-E ¶ 11 (Hall), NX 700D-G ¶¶ 6-9 (Morton), NX 800Z-5 to Z-20 ¶¶ 49-75 (Rosse). To the extent that specific geographic areas represent an attractive market, they are already targeted within the Free Press's zoned editions. See Hall 939-40, 943-45; NX 100Z-4 to Z-6 ¶¶ 62-63 (Chapman).

²³⁸NX 100Z-6 to Z-7 ¶¶ 64-67, (Chapman), NX 700G-L ¶¶ 10-16 (Morton), NX 800Z-5 to Z-20 ¶¶ 49-75 (Rosse). As far as this record will allow, Detroit has a "relatively homogenous population with similar news priorities and definitions of good coverage". AX 570Z-3.

²³⁹IX 518A; AX 2A. The Free Press and Knight-Ridder have made no efforts on their own to find an alternative purchaser. Chapman 1982-83; NX C-1, p. 15.

and how the publisher of the *Chicago Sun-Times* would proceed to return the Free Press to profitability were issues not developed on the record.

5. Some Predictions

a. Chapman

124. Alvah Chapman, the Knight-Ridder CEO, testified that he will shut down the Free Press if the JOA application is denied.²⁴⁰ The record, however, contains no convincing evidence that he seriously considered closing the Free Press prior to his witness stand bolt out of the blue and accordingly I have assigned little weight to this threat. There are no contemporaneous documents indicating that this recommendation had been pressed before the Knight-Ridder Board.²⁴¹; on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied.²⁴² It should be further noted that Knight-Ridder has never shut down a single paper²⁴³, and Chapman did not rule out finding a buyer interested in operating the Free Press should it ever reach the point when Knight-Ridder would no longer wish to challenge Gannett for the rich Detroit market.²⁴⁴

²⁴⁰Chapman 1959-66.

²⁴¹See Chapman 1793-95, 1966-67. See also AX 8A-B. The closing option was raised in 1982 (AX 514C) but was emphatically rejected as the Free Press and Knight-Ridder proceeded forward with the increased spending inherent in the Tiger plans. See Findings 19, 28, 32-33 and Chapman 1872-74, NX 100Z-21 to Z-22 ¶ 96 (Chapman).

²⁴²AX 515A-F. See IX 268A for evidence that as late as June 1986, Lawrence, the Free Press's publisher, was planning for an expansion "regardless of the outcome of the JOA". See also AX 300C ¶ 5 (Baseman).

²⁴³Chapman 2148.

²⁴⁴Chapman 1980-81.

Finally, if a Free Press closure was imminent, it would have made no economic sense for Neuharth to agree to share the prospective JOA profits with Chapman since Gannett could have realized a monopoly return by simply waiting for the Free Press to fold.²⁴⁵

b. Rosse

125. Applicants rely heavily on the opinions of John Rosse, an expert in the field of newspaper economics. Citing the Free Press's financial losses since 1980, the significant decline in the size and economic vigor of the Detroit market, and the News's lead in advertising revenues as well as certain key circulation areas, Rosse concluded that the Free Press viewed on a stand-alone basis is in probable danger of financial failure and can only be saved by a JOA.²⁴⁶

126. As Rosse would have it, the root cause of the Free Press's problems is the pivotal role played by economies of scale (the decline in the average cost of producing a unit of a commodity as the quantity produced increases²⁴⁷) in newspaper competition. Rosse argued that these economies exist principally (but not solely) because expenses incurred in creating and composing content (reporting news, editorial contributions, editing, composing, platemaking, typesetting and some of the costs of selling and preparing advertising) are imbedded in the cost of the initial newspaper, and thus the average cost attributable to these "first-copy" expenses fall as number of copies circulated rises. Economies of scale, ac-

²⁴⁵Baseman 3205-07; AX 300A to Z-2 ¶¶ 1-66 (Baseman). By the same token, if Knight Ridder was seriously contemplating closure, it would not have turned down, as apparently it did, JOA opportunities offering it 40% or 45% profit splits. AX 300D ¶ 6 (Baseman).

²⁴⁶NX 800C-J, Z-53 ¶¶ 7-11, 147-149 (Rosse).

²⁴⁷NX 800'I', K ¶¶ 10, 13 (Rosse).

cording to Rosse, also exist because some costs of producing and distributing a paper (such as the cost of maintaining a home delivery and street-sale system and the cost of circulation promotion) do not increase or increase less than proportionally when the number of pages in a paper increase. After finding that the News enjoys a significant cost advantage over the Free Press due to scale economies, Rosse concluded that this advantage creates an unstable equilibrium which will lead eventually to the demise of the Free Press.²⁴⁸

127. The applicability of Rosse's scale economies analysis to the Detroit market is questionable on several grounds. In the first place, his econometric research came down to a selection of just one from at least four candidates for the average unit costs of these two large newspapers. As it happens, the average cost per copy for the News is higher than the average cost per copy of the Free Press. Similarly, the average cost per page for the News is higher than the per page cost for the Free Press.²⁴⁹ After recovering from this "startling observation"²⁵⁰, Rosse proceeded to calculate what he described as a more reliable measure of scale economies in the form of operating expenses applied to the number of pages produced

²⁴⁸Rosse 2550-51, 2671-73; NX 800K to Z-5 ¶¶ 14-48 (Rosse).

²⁴⁹Rosse 2434, 2648, 2650-57, 2795; NX 800V-W ¶ 33 (Rosse), NX 804A, NX 805A, NX 806A, NX 807A, NX 809A-B, NX 810A-D.

²⁵⁰Rosse 2646 or, as Rosse put it elsewhere, "...the advantages for the News that the presence of economies of scale predicts are not readily apparent". NX800 N ¶ 33 (Rosse). The News's economies "may" or "could" be hidden by reason of its greater Sunday circulation and larger number of pages. According to Rosse, "If a newspaper contains more pages, it may cost more per copy than a smaller newspaper with lower circulation, because the economies of scale in copies is hidden by increased cost from the larger number of pages in each copy. In other words, all else is not equal in this comparison of average cost per circulation because the number of pages published also differs. Similarly, ...the larger number of copies could cause the paper with more pages to have higher cost per page, because the greater number of times each page is printed masks the effects of economies of scale in pages." NX 800W-X ¶ 34

multiplied by paid circulation, the so-called "page impression" measure. But on this course too, Rosse first had to reject at least one proxy for page impressions — full run pages multiplied by circulation — which produced results indicative of roughly similar per unit costs for the two papers over a 10-year span.²⁵¹ Finally, Rosse arrived at a second proxy for page impressions — tons of newsprint consumed — which showed that Free Press costs exceeded News costs by .53% to 5.86% between 1982 and 1986.²⁵² The usefulness, however, of this entire exercise is thrown into doubt by Rosse's concession that the significance of scale economies generally declines as newspaper size increases²⁵³, which at least indicates that verification of relative superior economies for newspapers of the size of the Free Press and the News requires more persuasive

(Rosse). While these possibilities weighed heavily in Rosse's rejection of average cost per copy and per page, he gave short shrift to the equally plausible likelihood that at such high circulation levels the cost of attracting additional circulation has the effect of defining a cost curve which differs markedly from what his research on smaller papers had predicted. As it happens, in his scale economies analysis based on copies and pages Rosse excluded as variable or marginal costs the demand-enhancing expenses which he had identified as the very areas where the News outspends the Free Press. Rosse 2428-32, 2626-28, 2658-60. Their inclusion, which is at least arguably proper if the issue is the existence of an unstable equilibrium, would have altered Rosse's cost curves even further in the Free Press's favor. Rosse 2430-32, 2790, Simon 3249; AX 100U, Z-2 to Z-3 ¶¶ 16-29, 37 (Simon). As for the variable costs which were included in Rosse's scale economies analyses based on copies and pages, the record indicates that there is a high degree of subjectivity involved in their selection. Rosse 4211-13, 2416, 2790; NX 808A-M; AX 100S-T ¶ 27 (Simon).

²⁵¹Rosse 2654, NX 800X to Z-1 ¶¶ 36-39 (Rosse); NX 811A-B. In the use of this proxy there may have been a bias against the Free Press since the methodology favors the paper (here, the News) with the most full-run editions and the largest number of home delivery sales. Simon 3233-36; AX 100 to Z-2 ¶¶ 32-36 (Simon).

²⁵²Rosse 2661-68; NX 800Y to Z-4 ¶¶ 38-42 (Rosse), NX 812A-B, NX 843A-B.

²⁵³See Rosse 2424-2427, 2483-84, 2483-84, 2636-37; 2782-83, Simon 3249-52; NX 800Q-R ¶ 22 (Rosse).

evidence than the highly conflicting results reported by Rosse. But even assuming that Rosse's ultimate page impression analysis represents some indication that the News enjoys some costs advantages, there is no proof whatsoever that this highly speculative advantage has had or is likely to have a decisive impact. According to Rosse, the News has put its cost advantage to use by outspending the Free Press on editorial and promotional expenses.²⁵⁴ But Rosse never explained how this use of efficiencies even comes close to being crucial given the fact that the News has enjoyed all or part off this advantage for close to 30 years and has barely been able to maintain a small circulation lead while incurring large losses. Besides, Rosse conceded that these additional promotional and editorial expenditures by the News may be offset by a whole range of factors including differences in managerial and editorial skills.²⁵⁵

128. The limitations of Rosse's scale economies analysis is revealed most plainly in what he did not claim. Rosse, who has testified in favor of every contested JOA application, has previously indicated that the power of scale economies in newspaper competition is manifested in what has been described as the "downward spiral" hypothesis which holds that in two-paper markets the dominant paper will inevitably assert its cost advantage to gain a decisive advertising or circulation lead. The theory then goes on to predict that once the junior

²⁵⁴Rosse 2437-38, 2658-61; NX 800Z-2, Z-4 to Z-5, Z-27 ¶¶ 27, 45, 47 (Rosse), NX 813, NX 817, NX 819.

²⁵⁵See Rosse 2430-34, 2437-39; NX 800V, Z-27 ¶¶ 32, 90 (Rosse). Significantly, it is usually the weaker paper that spends more on promotion. Morton 2245, 2455. And Rosse conceded that the volume of expenditures on editorial content tells us little about the relative quality of the papers. Rosse 2434-39. This concession may in part recognize the eleven Pulitzer Prizes won by Knight-Ridder between 1984-86, more than any other newspaper group has ever won in so short a period, as well as the many editorial achievements of the Free Press itself. See Rosse 2436, NX C-1, Appendix II, p. 3, NX C-3, Ex. 31.

newspaper suffers a significant circulation or advertising disadvantage, it is virtually impossible to recover against a senior competitor since advertisers value higher circulation and subscribers value a paper's advertising content, and therefore weakness in either advertising or circulation manifests itself first in a decline in one and then the other, and so on irreversibly.²⁵⁶

129. According to Rosse the historical validity of the economies—induced downward spiral has been verified in the demise of all but a few of the junior metropolitan dailies which have faced direct competition from a dominant rival.²⁵⁷ Because of this history, Rosse endorsed the Free Press's (and the News's) strategy of seeking market dominance or alternatively a JOA.²⁵⁸

130. Whether junior paper collapse is inevitable or not²⁵⁹,

²⁵⁶Rosse 2555-56; NX 800'O', Z-22 to Z-23, Z-30 to Z-33, Z-51 ¶¶ 20, 95-100 (Rosse). In the usual statement of the interrelationship, it is said that advertising usually follows circulation trends by several years. Rosse 2522.

²⁵⁷NX 800H-'I', Z-5, Z-51 ¶¶ 8, 9, 20, 48, 143 (Rosse). See also NX 700N-'O' ¶¶ 18-19 (Morton), NX 702-705.

²⁵⁸Rosse 2444-45; NX 800Q, Z-33 ¶¶ 21, 100 (Rosse).

²⁵⁹See e.g., Morton 2215-16, Rosse 2390, 2393, 2478, 2517-21, 2603-04, 2676, 2744, 2811-12, NX 803, AX 1B, AX 2A-B, IX 450J-L ¶¶ 32-38 (Dean). The notion that the junior paper faces inevitable extinction is ambiguous at best since the designations "dominant" and "junior" are not etched in stone. This is best seen in Philadelphia where the Knight-Ridder papers overcame a substantial daily circulation lead (and six years of losses) to triumph over the rival *Bulletin*. IX 364A, IX 367A-B, IX 397A-B. See also Rosse 2602-04 for evidence that in San Francisco the roles of "junior" and "dominant" were reversed despite scale economies. There is also some evidence that in recent years junior papers have been able to prosper in large metropolitan areas. See Rosse 2390-91, 2393, 2478, IX 518A. Besides, the very notion of the inevitable demise of a junior paper loses some of its force as applied to Detroit where the "junior" and "senior" papers have been fighting it out for almost 27 years and during most of that time both were profitable.

both elements of the downward spiral hypothesis are missing from the huge Detroit newspaper market. To begin with, there is no dominance in the Detroit market in the sense that one paper is overwhelmingly strong while the other is hanging on by its fingertips.²⁶⁰ As indicated in Finding 48, at the time the JOA was announced Applicants declared that they had fought to a virtual draw. Moreover, to the extent that the hallmark of dominance is the profitability of one and the losses of the other²⁶¹, here we have an entirely different picture: the Free Press was profitable until 1979, and both papers have had large losses since then.²⁶²

131. Most significantly, Rosse flatly acknowledged that the Free Press was not in a downward spiral²⁶³ and in that respect the Detroit newspaper market was drastically different from what he had observed in Seattle and Cincinnati where long-term trends (over 20 years) revealed that the paper which claimed to be failing was falling behind in circulation and slipping into the downward spiral.²⁶⁴ These long-term trends, so essential to Rosse's analysis in Seattle and Cincinnati, were not even charted by him in Detroit because there was no downward spiral.²⁶⁵ Rosse further acknowledged that the pat-

²⁶⁰Chapman 1945-46; but Chapman almost immediately recounted by saying that he "always considered the News dominant" (Chapman 1767), a claim which in turn is flatly contradicted by AX 506A-C. See Finding 49 and IX 40A.

²⁶¹See Rosse 2556.

²⁶²The News's losses have been greater than the combined losses of all other papers which have claimed "failing company" status under NPA. IX 450G-H ¶ 25 (Dean).

²⁶³Rosse 2448-52, 2457, 2467-68, 2544, 2550, 2812-14.

²⁶⁴Rosse 2521, 2531-34, 2540-41, 2544, 2680.

²⁶⁵Rosse 2525-49. See IX 506, IX 517. In Seattle, the failing newspaper had consistently lost circulation and advertising over a 20 year period. There was a similar decline in Cincinnati. IX 450D-F ¶¶ 12-17 (Dean).

tern of downward spiral which he had observed in other metropolitan areas could not be achieved in Detroit given the will of the two chains involved to avoid it.²⁶⁶

c. Morton

132. John Morton, Applicant's other retained expert and a newspaper industry stock analyst, testified that the Free Press was in such a seriously weakened position that it could not survive on a stand-alone basis and that its only hope was a JOA.²⁶⁷ Morton's testimony, however, is hardly entitled to any weight when considered in the light of his pre-litigation assessment of the Detroit newspaper war. In April 1982, Morton stated that the News was in greater risk of financial failure than the Free Press because "the long term trends in that market have been favoring the Free Press."²⁶⁸ In November 1983, Morton wrote that "both newspapers in Detroit were profitable until 1980, and both could make money now if circulation prices were higher".²⁶⁹ In October 1984, Morton wrote that the "Detroit Free Press, which has made significant product improvements this year, has been growing twice as fast in circulation as the competing Detroit News, despite the Free Press's higher price."²⁷⁰ In his August 31, 1985, newsletter, Morton wrote

Even if significant competition between the two dailies continues, the Free Press retains the inherent advantage of morning publication, and it now has management officials in place who are fresh from the

²⁶⁶Rosse 2467-69.

²⁶⁷NX 700Z-27, Z-34 to Z-35, Z-40 ¶¶ 86, 97, 109 (Morton).

²⁶⁸Morton 2189.

²⁶⁹Morton 2370-71.

²⁷⁰AX 579D.

drawn-out — but highly successful — fight for ultimate dominance in Philadelphia. The only scenario that we can envision that could hurt Knight-Ridder in Detroit is the unlikely one that Gannett would pull out all stops and move The News to morning publication, going head to head with the Free Press for that potentially more lucrative publishing cycle. As Times Mirror has discovered in both Denver and Dallas, such a move posed a great financial risk on the afternoon paper, and we doubt that Gannett would find the risk worthwhile. Thus, we stress that Knight-Ridder appears well positioned for any likely change in Detroit, and that company earnings could benefit handsomely.²⁷¹

As late as February 1986, Morton was of the view that if the Detroit newspaper war was to continue the News was “at greater risk” than the Free Press.²⁷² Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News.²⁷³ Even after the JOA was announced in April 1986, Morton said, “the Free Press is doing better than the News” and “if everything remained equal and the Free Press remained the morning newspaper and the News remained the afternoon paper, basically in the long run that would catch up with the News.”²⁷⁴

²⁷¹AX 581C-D.

²⁷²Morton 2193.

²⁷³Morton 2191-92.

²⁷⁴Morton 2332-33. Morton’s claim that his entire pre-litigation evaluation of the Detroit newspaper war suffered from a lack of knowledge of the financial condition of the News (see Morton 2341-46) is not credible given the magnitude of the News’s losses. See Finding 92.

133. Morton, who shared Rosse’s pre-litigation view of the importance of the downward spiral²⁷⁵, testified that the Free Press was not in one.²⁷⁶

d. *Baseman.*

134. Based upon a careful analysis of the present discounted value to Gannett of the 50/50 profit split (estimated at \$475 million) and the likely future monopoly profits to Gannett in the absence of a JOA (that is, with the presumed failure of the Free Press), the Antitrust Division’s retained expert, Kenneth Baseman, concluded that the JOA profit split represented a recognition by Gannett that the Free Press would remain in existence for at least seven to ten years; otherwise, Gannett would have found it more profitable to wait for the Free Press to fail.²⁷⁷ Baseman’s analysis assumes that Knight Ridder will continue to subsidize the Free Press during this interval.²⁷⁸

²⁷⁵See Morton 2245-47.

²⁷⁶Morton 2240-41.

²⁷⁷Baseman 3148, 3189; AX 300A to Z-2 ¶¶ 1-66 (Baseman). The validity of Baseman’s analysis is supported by IX 14A-B which shows that the Free Press made precisely the calculation which Baseman predicted that newspapers make, i.e., a comparison of future monopoly profits as against the profits to be derived from a JOA. See also AX 508C; IX 75A-B, H. Similar calculations were made at ENA, Gannett, and the News. IX 72A to Z-36, IX 170A-H. The 50/50 profit split should be contrasted with the JOA splits in Cincinnati (80/20) and Seattle (68/32). AX 300H-“I” ¶¶ 18-19 (Baseman); IX 236A-D, IX 450G ¶ 20 (Dean), IX 454. As a senior Knight-Ridder executive pointed out “There is little parallel between the Seattle/Chattanooga/Cincinnati agreements and the present situation in Detroit. Neither Detroit newspaper is dominant in the sense of conditions reflected in those markets.” IX 40A. While the 50/50 split does not become operational until the sixth year of the JOA, the parties recognized that because of start-up costs the JOA will probably not move into its most profitable mode until then. Chapman 1942-43.

²⁷⁸Baseman 3143.

135. Applicants argue unpersuasively that the significance of the 50/50 split was overstated by Baseman because Gannett in effect traded future profits for control of the JOA. In the first place, on major issues of governance (initial contributions, capital expenditures, cash distributions, sale of assets, borrowing, volume of news content, use of color, and the form and structure of the weekend editions) Gannett has no effective control since nothing can be done without Knight-Ridder approval.²⁷⁹ Moreover, contemporaneous evidence indicates that the profit split was not based on the question of control but instead reflected the crucial importance of the morning franchise. John Fontaine, a member of the Knight-Ridder Board and the corporation's General Counsel, wrote to Chapman on September 23, 1985

... we can make a persuasive argument that *over time* the morning paper will contribute more to the agency than the afternoon paper. The fallback position if we do not prevail on 50/50 might be to start below 50% (reflecting our greater current losses) with our share increasing over (for example) three years to 50%.²⁸⁰

C. The Terms of the JOA

136. The application filed by the Free Press and the News states that the JOA will become effective 10 days after approval by the Attorney General, and will have an initial term of 100 years.²⁸¹

²⁷⁹Chapman 1888-89. See also IX 265C-D, P-Q, S.

²⁸⁰AX 577B. See also IX 265H-"I" and IX 251A in which Nelson, the former publisher of the News, informed Neuharth that the morning market "had a far greater potential than the evening field". It should also be noted that Baseman did, in fact, take into account the control factor in estimating Gannett's perception of the Free Press's survival time. Baseman 3172-73.

²⁸¹NX C-2, Ex. 1, ¶ 1.2, 7.1.

137. The JOA contemplates that the Free Press will publish a Monday to Friday morning paper while the News will publish a Monday to Friday afternoon paper.²⁸² On Saturday and Sunday, only one paper will be published with each paper assuming separate editorial and news responsibilities.²⁸³

138. By the terms of the agreement, the News and editorial staffs of the two papers are to remain independent and neither party to the arrangement may influence or impair the independent news and editorial voice of the other party's newspaper. The agreement provides:

Preservation of the editorial independence of each newspaper is of the essence of this Agreement. To this end, the news and editorial material for the *Detroit Free Press* shall be gathered, prepared and laid out by DFP and the news and editorial material for *The Detroit News* shall be gathered, prepared and laid out by DNI. . . The DFP and DNI news and editorial staffs shall be independent and neither DFP, DNI nor the Agency shall seek to influence or to impair the independent news and editorial voice of any other party's newspaper. Without limiting the gene-

²⁸²NX C-2, Ex. 1, ¶ 2.1. The timetable was clarified by a letter agreement which provides that the News may make no home deliveries before 11:00 A.M. and street sales consistent with a press start of no earlier than 6:15 A.M. NX 841D.

²⁸³NX C-2, Ex. 1, ¶ 2.1. For the Saturday edition, the staff of the Free Press will prepare the "breaking-news" sections while the News's staff is given responsibility for the "feature-news" sections. These assignment are reversed for the Sunday edition. NX 841. Although this arrangement allocates some editorial judgment (see Lawrence 2980-81), the Ninth circuit in *Hearst* accepted the Attorney General's determination that publication of a single Sunday edition in Seattle (there, predominantly by the *Times* with the *Post-Intelligencer* allocated six pages of reportorial and editorial content) was consistent with the statutory requirement of maintaining separate and independent editorial and reportorial functions. *Hearst*, 704F.2d. at 482; *Recommended Decision of ALJ*, Dkt. 44-03-24-06, at 7 (January 14, 1986).

ality of the foregoing, DFP and DNI each shall have the exclusive right to determine the editorial format, dress, layout and news and feature content of its newspaper. . . All personnel responsible for the news and editorial content of the *Detroit Free Press* shall be employees of DFP and shall be subject to the discretion and authority of DFP, and all personnel responsible for the news and editorial content of *The Detroit News* shall be employees of DNI and shall be subject to the direction and authority of DNI.²⁸⁴

139. As for the non-editorial and non-reportorial aspects of the two papers, the agreement provides that the Free Press and the News will form a partnership, to be known as The Detroit News Agency ("Agency"), which will control all of the business, commercial, and production aspects of publishing including the establishment of circulation and advertising prices.²⁸⁵

140. The Agency is to be managed by a five-person management committee with three members appointed by the News and two by the Free Press. The management committee will act on all matters by majority vote of a quorum present, except for nine specified, "joint action" matters that will require approval by at least two of the News' appointees and both of the Free Press's appointees. These "joint action" matters include calls for large capital contributions and expenditures, any agreements between the Agency and the News or the Free Press, decreases in the frequency of agreed-upon cash distributions, disposition of Agency assets, incurrence of debt, adoption of or changes in accounting or tax practices, and changes in allocations of news content and use of color as well as alternations in format or structure of the weekend editions.²⁸⁶

²⁸⁴NX C-2, Ex. 1 ¶ 2.3.

²⁸⁵NX C-2, Ex. 1 ¶ 2.1.

²⁸⁶NX C-2, Ex. 1 ¶ 5.1.

141. The proposed arrangement further calls for the two newspapers to make capital contributions in equal amounts to the Agency. The arrangement provides that if one of the newspapers makes an initial capital contribution in an amount less than the other, then the party making the lower capital contribution is to make a cash payment to the Agency of an amount equal to its deficiency in capital. The initial capital contribution of the Free Press calculated as of the close of fiscal 1985 will be \$88,442,601 in property, plant, and equipment. The initial capital contribution of the News is placed at \$101,046,280. The Free Press thus will be required to make a payment in excess of \$12 million within a 10-day period following the effective date of the creation of the Agency.²⁸⁷

142. During the first three years of the arrangement, the Free Press is to receive 45% of the profits of the Agency while the News' share will be 55%. In the fourth year of the Agency, the Free Press will receive a 47% share and the News will receive a 53% share. The Free Press' share will increase to 49%, and the News' share will decline to 51%, in the fifth year of the Agency's operation. Beginning in the Agency's sixth year, profits and losses will be shared equally by the Free Press and the News.²⁸⁸

III.

DISCUSSION

Congress enacted the Newspaper Preservation Act, ("NPA"), Pub. L. 91-353, 84 Stat. 466, 15 U.S.C. §§ 1801-1804, on July 24, 1970. It reversed the Supreme Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (hereinafter "*Citizen Publishing*") which held that

²⁸⁷NX C-2, Ex. 1 ¶¶ 1.4-1.8.

²⁸⁸NX C-2, Ex. 1 ¶ 4.2.

a Joint Operating Agreement ("JOA") involving market allocation, price fixing, and profit sharing, between the two daily newspapers in Tucson, Arizona violated the Sherman Act because the newspapers failed to meet the stringent requirements of the "failing company" doctrine. As articulated in *Citizen Publishing*, the doctrine would only allow an antitrust exemption when the resources of one of the papers involved in a JOA are so depleted, and its prospects are so dim, that it cannot be resuscitated by some viable alternative including reorganization after bankruptcy or possible sale to a non-competitor.²⁸⁹

With the passage of NPA, a limited exemption from the antitrust laws (and specifically from the "failing company" doctrine of *Citizen Publishing*) was allowed for those future JOA's²⁹⁰ receiving the prior written approval of the Attorney General. NPA also provided a retroactive exemption without review to those arrangements already existing at the time of

²⁸⁹The rationale of the "failing company" doctrine was spelled out in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) in which the Supreme Court reasoned that a consolidation (there, a merger) between two competitors, one of which is failing, could have no adverse effect on competition because even if there were no merger the failing company would disappear as a competitive factor. The Court held, however, that before the "failing company" exemption could be invoked, the acquired firm must have been on the verge of liquidation with no alternative purchaser in sight.

²⁹⁰The term "joint newspaper operating arrangement" is broadly defined to include almost any form of arrangement or joint venture between two or more independently owned newspapers "pursuant to which joint or common production facilities are established or operated," provided that "there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2).

enactment²⁹¹ if they met the statute's less stringent requirements for pre-1970 JOA's.²⁹²

For post-1970 JOA's, the Attorney General must make two findings before approval can be granted: first one of the newspapers must be "failing", defined as a paper "which, regardless of its ownership or affiliations, is in probable danger of financial failure"²⁹³; and second it must be determined that approval of the JOA would effectuate the policy and purpose off the statute, namely, to protect editorial and reportorial competition from the adverse consequences which presumably would follow if a newspaper fails commercially.²⁹⁴

In deciding whether the exemption applies here, I have looked to the following record facts:

1. The war between the Free Press and the News is not of recent vintage. It traces back to at least 1960.
2. The Detroit newspaper war entered a particularly severe phase in the 1970's, and continued unabated during a period when Detroit was facing a harsh economic environment.

²⁹¹At the time the Supreme Court decided *Citizen Publishing* in 1969, joint operating arrangements existed in 22 cities. Most of these involved provisions similar to those which the Supreme Court held unlawful.

²⁹²The Act exempts joint arrangements entered into before July 24, 1970, if, when first entered into, "not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

²⁹³15 U.S.C. § § 1802(5), 1803(b).

²⁹⁴The policy and purpose of the Act are found in 15 U.S.C. § 1801

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

3. In this latest phase of the struggle, both papers contemplated that the goals of market domination and future profitability were to be achieved at the expense of current profits since the costs associated with capital expenditures, promotions, and above all low circulation and advertising prices, would inevitably produce losses.

4. The strategies pursued by the Free Press and News — future domination and profitability at the cost of current profits — were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral. There is no convincing proof, however, that the economic conditions underlying this history — particularly the effects of scale economies — is applicable to these two large papers operating in the huge Detroit newspaper market.

5. At the time the JOA was negotiated, the News was leading in most circulation, revenue, and lineage measures of the rivalry between two competing metropolitan newspapers. It was not, however, in a clearly dominant position: the News was suffering deep losses of its own; the Free Press was in striking distance of the total circulation lead, which the News had only been able to hold by discounting its already low cover prices; and the News's advertising lead, which was also sustained by severe discounting, was vulnerable to a change in the circulation lead.

6. The Free Press was not in a downward spiral of inter-related circulation and advertising decline when the JOA was negotiated and it will not enter the downward spiral so long as Knight-Ridder remains in Detroit.

7. If the struggle continues, there is no convincing evidence that superior scale economies is likely to be determinative for the News.

8. If the struggle continues, there is no convincing evidence that the Free Press's advantages, including its morning franchise and its slightly superior geographic positioning and readership demographics, will assure profitability.

9. While there is little evidence that the Free Press vigorously pursued cost-cutting measures during its struggle with the News, there is even less in the record challenging the perception of Applicants' witnesses that, in fact, without a JOA there would be few real opportunities for such savings. In this connection, the reticence of Intervenor, the major newspaper unions, on the question of possible wage and job concessions — a crucial newspaper cost — is especially telling.

10. No accounting legerdemain created the Free Press's large operating losses, and no accounting sleight of hand (or resolution of quibbles about equity-debt conversions, management fees, taxloss carryovers, or amortization of expenses) can eliminate them.

11. The News's operating losses are almost as severe as the Free Press's and are attributable to the same causes — an attempt (in a depressed economic environment) by a deep-pocketed chain to achieve market domination and future profitability at the cost of current profits.

12. The objectives of dominance and future profitability were pursued by both papers (and their parents) in the belief that failure too had its reward in the form of JOA approval.

13. The negotiation of the JOA agreement also reflected the distaste of both Gannett and Knight-Ridder for head-to-head competition in which neither side could achieve profitability so long as the other persisted in following the goal of domination.

14. The filing of the JOA application adversely affected Free Press performance.

15. The JOA agreement is essentially a 50/50 profit split, and Applicants did little to disturb the careful analysis of Kenneth Baseman, the Antitrust division's retained expert, who demonstrated that this arrangement represents a perception by Gannett that there can be neither clear winner nor a clear loser for at least seven years.

16. On the is record, one cannot conclude that reader and advertiser demand in Detroit is so inadequate that the market cannot sustain two profitable papers irrespective of changes in pricing policies. On the contrary, most of the persuasive contemporaneous evidence indicates that at higher circulation and advertising prices, Detroit can sustain two profitable papers even at the current level of the city's economic performance.

17. Neither paper can achieve profitability (or survive indefinitely if viewed on a stand-alone units) so long as its parent-chain persists in its present strategy of sacrificing current profits for dominance and future profitability or a JOA; or, as one might expect, Detroit cannot sustain two profitable papers when both are practically being given away.

18. Since neither the Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability.

From all this, Intervenor and the antitrust Division contend, minimally, that the JOA application is premature, and before countenancing a 100-year departure from the competitive norm, the Attorney General should allow the free market time to work its will in the sense that in the absence of a JOA the Free Press (or the News) may modify its behavior, and follow a more profitable course of action in the

form of price increases, or the acceptance by one or the other of a less than dominant position in the Detroit market.

Applicants, on the other hand, argue that in the face of seven years of deep losses at the Free Press, all that the Intervenor and the Antitrust Division are really saying is that there is some likelihood of collusion, direct or indirect, which may raise prices to the point of profitability. Applicants then argue that it was not the intent of congress that the basic policy of NPA — to preserve distressed newspapers — should be subverted by resorting to this sort of speculation over possible parallel or interdependent pricing.

Both sides claim to find support for their arguments in the legislative history and the only post-1970 JOA case decided under NPA, *Committee For an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) (hereinafter "*Hearst*").

Looking first to the legislative history, it is readily apparent that in passing NPA, Congress had two purposes in mind: first to stop dead in its tracks any further application of the *Citizen Publishing* in extremis standard to existing JOA's²⁹⁵; and second to formulate for future JOA's a standard that was far more stringent than the test for existing JOA's but again less demanding than *Citizen Publishing*.²⁹⁶ Since we are here deal-

²⁹⁵See, e.g., S. Rep. No. 91-535, 91st Cong., 1st Sess. 4 (1969) ("The [Judiciary] Committee wishes to establish a less stringent test than that applied in the case of *Citizens Publishing Company*. . . ."); see also *Hearst*, 704F.2d 476.

²⁹⁶The various Senate bills made no distinction between existing and prospective JOA's in applying either the "not likely to remain or become financially sound" test or the "probable danger of failure" test. This approach was specifically rejected in the House (and in the final bill) in favor of applying the "probable danger" standard to prospective JOA's only and allowing for a less stringent test for existing JOA's. See *Hearst*, 704F.2d at 474, 477.

ing with a post-1970 JOA, the problem is to parse the meaning of "probable danger of failure" by determining what lies between the strict "grave probability of a business failure" standard of *Citizen Publishing* and the more lenient "[un]likely to remain or become a financially sound publication" standard of NPA for pre-1970 JOA's. From my reading of the legislative history, I have concluded that this area should be defined by evaluating the evidence respecting the existence of conditions leading to dominance and the downward spiral.

The significance of dominance and the downward spiral to the failing newspaper problem was plainly set out by Congressman Matsunaga, the principal sponsor and spokesman for 108 cosponsors of H.R. 279, which became the Newspaper Preservation Act. After describing the interrelationship between a decline in circulation and advertising, Congressman Matsunaga concluded that "The consequence is then a further decline in circulation with the almost irreversible downward spiral ending in a business failure."²⁹⁷ For pre-1970 JOA's, the legislative history strongly indicates that the exemption was to be invoked on the basis of an incipency rationale, a potential for a downward spiral as shown, for example, by losses and one paper moving into a lead over its competitor. This potentiality concept stood in marked contrast to the *Citizen Publishing* holding that there could be no exemption unless the downward spiral had progressed to the point that the JOA was the only alternative to liquidation. Again, Congressman Matsunaga speaking in defense of the pre-1970 "unlikely to remain or become financially sound" language, said —

²⁹⁷Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 91st Cong. 1st Sess. at 10-11 (1969) [hereinafter, 1969 Hearings on H.R. 279].

Once a downward spiral, occasioned by the interrelationship of advertising, circulation and increasing costs, has led a newspaper to the crisis point demanded by the failing company doctrine, a competitor is likely to prefer the demise of the ailing newspaper to a cooperative arrangement that, if consummated at an earlier date, could have saved it not only as a commercial enterprise but more importantly, as an alternative independent editorial voice. Furthermore, the strict test of when a company is failing under the *International Shoe* and *Citizen Publishing* decisions is inappropriate in the newspaper industry because a severely financially threatened newspaper stands in jeopardy of losing its most valuable editorial and reportorial personnel to more stable competitors. It is doubtful that any remedial steps taken after loss of those highly skilled persons would be successful in restoring such a paper to its former editorial strength.²⁹⁸

There is surprisingly little, however, in the legislative history about what lies between the incipient or potentiality standard for pre-1970 JOA's and the insistence in *Citizen Publishing* on the death rattle at the end of total dominance and the downward spiral. While the meaning of the language used to describe this terrain — "probable danger" — was not extensively discussed, there are some clues in the legislative history as to its meaning. Thus we know for certain it does not mean a "grave probability" of either dominance or a downward spiral since "grave probability" was the standard of *Citizen Publishing* and there is not a hint in the legislative history that congress wanted any part of *Citizen Publishing* even for post-1970 JOA's.²⁹⁹ What the legislative history does suggest,

²⁹⁸1969 Hearings on H.R. 279 at 12.

²⁹⁹See, e.g., 1969 Hearings on H.R. 279 at 12 (statement of Cong. Matsunaga).

however, is that for these post-1970 JOA's, there must at least be convincing evidence of an irreversible economic condition that would produce domination and a downward spiral. I find some support for this conclusion from the fact that the "probable danger" language traces back to the Bank Merger Act of 1966 which just prior to congressional deliberations over NPA had been before the Supreme Court in *United States v. Third National Bank*, 300 U.S. 171 (1968).³⁰⁰ There the court had denied an exemption because the main reasons for the alleged failure — unsound loans and the inability of the failing bank to investigate credit risks properly — were due to managerial shortcomings which presumably could be overcome either by new management or by a change in the strategy of existing management. In other words, what was missing from *Third National Bank* was proof by the proponents of the exemption of some immutable economic condition that would defy some different management strategy. The legislative history also requires that the existence of such a condition should neither be lightly nor prematurely inferred.³⁰¹

I believe that this reading of the legislative history is consistent with *Hearst*. There the Ninth Circuit said that while operating losses alone were not determinative, the applicant would be afforded "failing newspaper" status on a record

³⁰⁰*Hearst*, 704F.2d 476. See also *Hearings on S.1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong. 1st Sess. at 4, 9, (1969) (statements of Sen. Fong and Sen. Dirksen).

³⁰¹The very requirement in NPA for approval by the Attorney General was intended "to act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition". 116, Part 2 *Cong. Rec.* 2006 (1970) (statement of Sen. Hruska).

which proved that 15 years of such losses were irreversible as shown by (a) the dominant position of the applicant's competitor; (b) a downward spiral of interacting circulation and revenue losses by applicant; and (c) the non-availability of viable alternatives including the existence of healthy aspects of the applicant newspaper that might profitably be exploited. *Hearst*, 704F.2d, 470, 479. Thus the plain meaning of *Hearst*, when taken together with the legislative history outlined above, is that for these post-1970 JOA's, the standard of NPA is not met if despite losses there is no convincing proof that the alleged failing paper is at least facing irreversible conditions which will lead to dominance and the downward spiral. In *Hearst* itself, market conditions had progressed to the point that one paper had already "attained" dominance while the other "had been caught in the phenomena that is called the 'downward spiral' in which a newspaper's declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close." *Hearst*, 704F.2d at 471, 478.

Hearst, however, clearly does not say, as Intervenor intimates, that a JOA application may be approved when one of the papers is already in a downward spiral. To adopt this line of reasoning requires one to ignore the fact that in reversing *Citizen Publishing* Congress knew that the past history of the newspaper industry had shown that once clear market domination has been achieved and the junior paper was into the downward spiral, recovery was so unlikely that the prudent senior paper had little incentive to enter into a JOA because it needed only to wait for a natural monopoly to occur, a result which was clearly contrary to the public policy of NPA. *Hearst*, 704F.2d, 47374, 476.

As for Applicant's view of *Hearst*, it must be first noted that despite their insistence to the contrary, the *Hearst* requirement that there be a stand-alone evaluation of the Free

Press³⁰², cannot be transformed into a requirement that one must be oblivious to the obvious point that the Free Press's financial condition was traceable to the parent's strategy of seeking future domination and profitability (or a favorable JOA) at the expense of present profits. Even if this goal of domination was economically rational (that is, not indicative of mismanagement) I find nothing in the legislative history or *Hearst* which says that losses attributable to such a policy guarantees an exemption under NPA. While mismanagement or the use of creative bookkeeping by a parent to create the illusion of a failing subsidiary requires a denial of failing paper status, this does not mean that losses produced by competent management, irrespective of overall corporate policy, guarantees certain approval. To adopt such a line of reasoning would mean that any newspaper could engage in a whole panoply of risky strategies secure in the knowledge that the reward for failure — a JOA — may be just as valuable as, say, a successful attempt at monopolization. At most, I read NPA as being neutral on this point, neither penalizing nor rewarding firms determined to eliminate their competition.³⁰³

³⁰²The *Hearst* court concluded that the NPA language — "regardless of ownership and affiliation" — requires that the evaluation of the financial condition of a paper be made on a stand-alone basis since no assumption can be made that even the most deep-pocketed parent will continue to fund losses indefinitely. *Hearst*, 704F.2d 480-81.

³⁰³Whether this neutrality would extend to predatory pricing is an issue that does not have to be resolved here although the record at least suggests a scenario which would severely test the neutrality hypothesis. To illustrate, it was a close question as to whether the Free Press or News would be designated the "failing paper" for purposes of filing the JOA application. Finding 43. But the News's losses arose from such severe discounting that Gannett expressed concern over "the potential problem of illegal advertising contracts entered into by the News and their advertisers during their war for ad volume." AX 547.

The legislative history and *Hearst* are not neutral, however, on the requirement that the proponent of the JOA exemption has the burden of showing that losses (whether produced by the costly strategy of a deep-pocketed parent or otherwise) are traceable to an irreversible market condition which will probably lead to domination and the downward spiral. It is the existence of this immutable or irreversible condition which defines the area between the incipency standard for pre-NPA JOA's and the death rattle required by *Citizen Publishing*. If there is no convincing proof of the existence of such a condition, the application for an antitrust exemption should be denied.

Here, Applicants' economic expert, John Rosse, who had previously testified in practically all other litigated JOA cases about the crucial importance of the downward spiral as a reliable indicator of probable failure, acknowledged that there is no evidence in Detroit of this phenomenon. This gaping hole in Applicants' case was not filled by Rosse's subsequent explanation that only Knight-Ridder's largess has kept the Free Press out of the downward spiral. This opinion only begs the question of whether endemic to Detroit is an economic condition that will lead to dominance and a downward spiral. In other words, it neither adds nor subtracts from what the record plainly shows: that during a period of deep business recession if two strong-willed and deep-pocketed newspaper chains are bent on pursuing the costly goals of dominance and future profits (or a JOA) by charging the lowest circulation and advertising prices in the nation, the result, not surprisingly, is that both are going to ring up record losses. This does not constitute, however, proof that such losses are irreversible in the sense that because of scale economies the market is a natural monopoly which simply lacks the reader or advertiser base necessary to sustain two profitable papers irrespective of Free

Press or News strategies for achieving dominance.³⁰⁴ As it happens, not only is Applicants' evidence on scale economies weak, but the record shows that both the Free Press and the News have projected profitability at circulation and advertising prices which match those charged elsewhere. Moreover, the basic premise of the proposed JOA is that the two newspapers (through their so-called "Agency") will realize handsome profits from already planned price increases.

This is not to say that NPA requires proof from Applicant's that without a JOA it is a certainty that the Detroit market will inevitably produce one clear winner who sends a clearly defeated loser spinning out of control into a downward spiral. But, by the same token, since we are dealing with an antitrust exemption whose essential elements must be narrowly construed and established by the proponent (*Hearst*, 704F.2d 473, 478-79), Applicants should not be permitted to cover up their own glaring failure to prove the existence of an irreversible condition leading to a downward spiral by the expedient of a witness stand threat from the Knight-Ridder CEO that he will shut down the Free Press if the JOA is denied (all the pre-litigation evidence is to the contrary) or the warning by the Gannett CEO that in the face of certain losses, should he have to continue without a JOA, he will maintain current pricing practices (which requires acceptance of the odd notion that a rational and self-interested firm will persist in unprofitable behavior). As Applicants would have it, however, this testimony along with the evidence of operating losses somehow

³⁰⁴See e.g., 1969 *Hearings on H.R. 279* at 9 ("Where the context is one of increasingly high publishing costs and a limited market area, the theoretical constructs of competition may become unworkable") and at 15 ("The anti-trust laws cannot create commercial competition where the economics of the situation will just not allow for the continued operation by two totally competing papers") (statements of Cong. Matsunaga).

shifts the burden to the Intervenor and Antitrust Division to provide sure-fire proof that the Free Press and News will move independently to the higher prices that are not only indispensable to profitability without a JOA but are inevitable with a JOA. Such an allocation of proof would mean that the grant of a 100year exemption from the antitrust laws would turn on the ability of opponents to prove what the proponents may or may not do in the future.

The burden of proving all essential elements of the NPA exemption rests with the applicants at all times. 28 CFR § 48.10(a)(4). This burden is not met by witness stand declarations of company officers (or retained experts) respecting the future intentions of Gannett or Knight-Ridder. Once the issue is joined in litigation, statements about future intent lend themselves to being shaped by adversarial consideration. See, e.g., *United States v. Phillips Petroleum Company*, 367 F. Supp. 1226, 1238 (D.C. Calif. 1973). At most, this kind of evidence (whose "utility is sharply limited", *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 565 (1973) (concurring opinion of Mr. Justice Marshall)) must be weighed against the contemporaneous evidence. As I have indicated earlier, most of the persuasive contemporaneous evidence shows that Detroit was perceived by the Free Press and News as one of the richest, most attractive newspaper markets in the nation, and one which could sustain two profitable papers at higher circulation and advertising prices.³⁰⁵ This evidence, which at least strongly suggests that a city of Detroit's size is not a natural monopoly where scale economies dictate an irreversible economic condition that will lead to domination and a downward spiral, means that we never reach the question

³⁰⁵See Findings 10, 13, 98, 113.

of alternatives.³⁰⁶ Or to put it somewhat differently, the Intervenor and the Antitrust Division have no burden of showing how Knight-Ridder and Gannett if left to their own devices (that is, without the crutch of a JOA to lean on and based on their own perceptions of the worth of the Detroit market) will react and counterreact to each other's strengths, weaknesses, and strategies.

In sum, we know for certain that under the blanket of a JOA, both papers will settle back into the quiet life without any competition whatsoever. It remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both. The point under NPA and *Hearst* is that unless the record shows an irreversible condition indicative of probable domination and a downward spiral, the resolution of this sensitive question of how the marketplace is going to behave and what it will eventually produce should be left, as it usually is, to the free market itself.

IV.

CONCLUSIONS

1. The losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expectation

³⁰⁶In *Hearst* the question of alternative management strategies was considered only after it was demonstrated that "it was the economics of the newspaper industry, highlighted by the 'downward spiral effect which led to the P-I's failing financial health.'" *Hearst*, 704F.2d at 471. "After finding that the P-I's financial difficulties was irreversible, the ALJ then concluded that Hearst and the Times Company had met their burden of proving the P-I was in a state of 'probable financial failure'." *Ibid*.

that failure to achieve these goals would result in favorable consideration of a JOA application.

2. The Free Press is not dominated by the News.
3. The Free Press is not in a downward spiral.
4. Applicants failed to prove that there exists in Detroit an irreversible market condition that will probably lead to domination and the downward spiral.
5. In the absence of proof that it is confronted with actual or probable domination and a downward spiral, the Free Press does not qualify as a failing newspaper under the Newspaper Preservation Act.

V.

RECOMMENDED ORDER

The Administrative Law Judge recommends that the Attorney General issue the following order:

Upon consideration of all of the facts and applicable law, it is hereby ordered that the application by Detroit Free Press, Incorporated and the Detroit News, Inc., for approval of a joint operating arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*, be, and the same is, hereby denied.

Respectfully submitted,

/s/ Morton Needelman
Morton Needelman
Administrative Law Judge

DATED: December 29, 1987

BEFORE THE
ATTORNEY GENERAL OF THE UNITED STATES

In the Matter of)	
)	
Application by Detroit Free Press,)	
Incorporated, and The Detroit)	
News, Inc.)	Docket No.
Approval of a Joint Newspaper)	44-03-24-8
Operating Arrangement Pursuant to)	
the Newspaper Preservation Act,)	
15 U.S.C. § § 1801, <i>et seq.</i> ,)	

Notice to Parties of Record

The enclosed sheet has been received from Administrative Law Judge Morton Needelman, and will be included in the record of the above entitled matter.

/s/ Janis A. Sposato
Janis A. Sposato
General Counsel
Justice Management Division
U.S. Department of Justice
Washington, D.C. 20530

February 10, 1988
Washington, D. 20015

February 2, 1988

Ms. Janis A. Sposato
General Counsel Justice Management Division
Room 6328
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Dkt. No. 44-03-24-8

Dear Ms. Sposato:

Please inform the Attorney General and the parties that my Recommended Decision in the Detroit JOA proceeding should be corrected as follows:

- p. 100, note 260, line one: "recounted" should be "recanted"
- p. 121, line nine: insert "only" after "may"

Sincerely,

/s/ Morton Needelman
Administrative Law Judge

BEFORE THE ATTORNEY GENERAL
OF THE UNITED STATES

In the Matter of:)

Application by Detroit Free Press,)
Incorporated, and The Detroit News,)

Inc., for Approval of a Joint) Docket No.
Newspaper Operating Arrangement) 44-03-24-8
Pursuant to the Newspaper)
Preservation Act, 15 U.S.C. §§ 1801,) [August 8, 1988]
et seq.)

DECISION AND ORDER

Introduction

Under the Newspaper Preservation Act ("NPA"), 15 U.S.C. 1801 *et seq.*, the Attorney General of the United States has been given authority to grant a limited antitrust exemption for a joint operating arrangement ("JOA") between two newspapers, at least one of which has been demonstrated to be "failing." 15 U.S.C. 1803(b). The statute defines a "failing newspaper" to mean "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). If that statutory condition is met, approval of a JOA is appropriate if such approval "would effectuate the policy and purpose" of the Act — identified by Congress as "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. To this end, the JOA, while providing for joint or common production facilities, must

insure that separate editorial and reportorial staffs are maintained and that "the editorial policies [of the two newspapers are] * * * independently determined." 15 U.S.C. 1802(2).

On May 9, 1986, the *Detroit Free Press* (*Free Press*), which is published by Detroit Free Press, Inc., a wholly-owned subsidiary of Knight-Ridder, Inc., and *The Detroit News* (*News*), which is published by The Detroit News, Inc., a wholly-owned subsidiary of Gannett Co., Inc., filed an application for approval of a proposed JOA. The application sought to combine operation of the two Detroit daily newspapers, but on terms that insured the respective reportorial and editorial activities would remain separate and independent. The *Free Press* was identified as the paper in "probable danger of financial failure" within the meaning of the statute.

Following receipt from the Justice Department's Antitrust Division of its filing in opposition to the application, and the submission of a number of requests for intervention from others having an interest in the matter, I referred the application request to Administrative Law Judge Morton Needelman on February 25, 1987, with specific direction that the record be developed on seven factual questions concerning the financial status of the *Free Press*. See 28 C.F.R. 48.10. The major area newspaper unions and Mayor Coleman Young were allowed to intervene.

Over the ensuing months, an extensive record was developed that included documentary evidence, written and oral testimony, full opportunity for the applicants, interveners and the Antitrust Division, through their principals, witnesses and counsel, to be heard and to respond, and the submission by the parties of proposed findings and memoranda of law.

On December 29, 1987, Administrative Law Judge Needelman issued his Recommended Decision, together with

Findings and Conclusions, in which he recommended that the Detroit papers' application for a JOA be denied. Pointing to the aggressive market-domination strategies pursued by both the *Free Press* and the *News*, he observed: "It remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both." ALJ Recommended Decision, at 126-27.¹

The Administrative Law Judge remained unconvinced by the insistence of both newspapers that, if the JOA option is removed, current market conditions make a change in either's pricing practices competitively unsound and thus not at all likely. He viewed the *Free Press* as (a) not dominated by its competitor, (b) not in a downward spiral, and (c) not confronted with "an irreversible market condition that will probably lead to domination and the downward spiral." ALJ at 128. On the strength of these conclusions, it was the view of the Administrative Law Judge that there was insufficient basis from which to conclude that the *Free Press* faces probable danger of financial failure.

With all respect to Judge Needelman, review of this extensive record leads me to the opposite conclusion.

Background

This is the fifth application for a joint operating arrangement filed with the Attorney General under the Newspaper Preser-

¹References hereafter to the Recommended Decision of the Administrative Law Judge will be to "ALJ at ____." If specific fact findings are mentioned they will be referred to throughout as "FF" followed by the number of the finding in question.

vation Act. Unlike the previous four, however, all of which were successful, the circumstances of this filing presents for the first time the application of the Act in a large metropolitan market where fierce competition between the two existing newspapers has left both with substantial and persistent operating losses.

Detroit is a highly prized \$300 million dollar market, the fifth largest in the United States (ALJ at 74 (FF 98)), and thus it comes as no surprise that it attracted the intense interest of the country's two largest newspaper groups, Gannett (which owns the *News*) and Knight-Ridder (which owns the *Free Press*). Competition between the two appears to have "entered a particularly severe phase in the [1970's]" when both papers adopted strategies aimed at achieving long-term market domination and future profitability at the expense of immediate or short-term profits. ALJ at 112.

Neither newspaper has prevailed, despite the sizeable expenditures in 1976 and again in 1985 by Knight-Ridder of investment capital on its press facilities to expand the *Free Press*' production capacity. ALJ at 18-19 (FF 19), at 28-29 (FF 33). Rather, as the Administrative Law Judge put it (ALJ at 123-24):

* * * during a period of deep business recession if two strong-willed and deep-pocketed newspaper chains are bent on pursuing the costly goals of dominance and future profits (or a JOA) by charging the lowest circulation and advertising prices in the nation, the result, not surprisingly, is that both are going to ring up record losses.

That is precisely what occurred in Detroit, throughout the decade of the 80's. Both the *Free Press* and the *News* suffered sizeable operating losses in their respective efforts to

increase circulation and advertising revenues without either moving toward a position of market dominance. ALJ at 63 (FF 83), and at 71 (FF 92). It is the case that the *Free Press*' losses outstripped those of the *News* in each of those years (*ibid.*), and that it consistently trailed the *News* in most circulation, revenue and lineage measures. ALJ at 113. But the pricing and discount strategies adopted and maintained by the *News* so as to retain its market position defeated all prospects for its achieving profitability as well. ALJ at 71-72 (FF 92, 94), 77 (FF 101), at 114.

The recognized market solution to this competitive stalemate was found by the Administrative Law Judge to exist in higher circulation and advertising prices. ALJ at 115. Projections by both the *Free Press* and the *News* confirmed that, all else remaining constant, each could achieve profitability with price increases and the elimination of discounting. ALJ at 84-87 (FF 113, 114). Nonetheless, as Administrative Law Judge Needelman found, "[s]ince neither the *Free Press* nor the *News* can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability." ALJ at 115.

Discussion

The filing of a JOA application offers a possible alternative means of restoring the two Detroit newspapers to a position of profitability without compromising the independence of their reportorial functions. In order for such an arrangement to be approved, however, it must be demonstrated that the *Free Press*, "regardless of its ownership or affiliations," is in "probable danger of financial failure" within the meaning of 15 U.S.C. 1802(5).

Traditionally, this "failing newspaper" test has been applied in a market setting where a demonstrably weaker newspaper is experiencing mutually reinforcing market trends of declining advertising revenues and circulation, creating a "downward spiral" phenomenon that in all probability cannot be reversed. No such description fits either newspaper here.

Nonetheless, the danger of financial failure claimed by the *Free Press* appears to every bit as real in Detroit. Notwithstanding Knight-Ridder's heavy capital investment in an attempt to expand circulation and increase advertising (ALJ at 18-19 and 28-29), and certain longer-term strategic strengths that the *Free Press* claims it enjoys as the morning newspaper (ALJ at 36-41), the *News* retains a sizeable advantage in advertising revenues, generating some \$61 million more than the *Free Press* in 1986. ALJ at 55-56 (FF 72); and see ALJ at 59-60 (FF 78). This advantage, juxtaposed against operating losses experienced by the *Free Press* each year since 1979, aggregating over \$81 million through 1986 (ALJ at 63), points in the direction of a "failing newspaper." If, as all seem to acknowledge (ALJ at 77 (FF 102)), the *Free Press* is unable unilaterally to restore the paper to a profitable position (ALJ at 81-82 (FF 110), 89 (FF 116), and at 115), and has no realistic prospect of outlasting the *News*, given the latter's substantial advertising and persistent circulation lead (ALJ at 113), the danger of financial failure, if not imminent, certainly seems "probable."

In the Seattle JOA case, Attorney General Smith construed the Newspaper Preservation Act as follows: "It is apparent from the express language of the statute that 'failing newspaper' analysis under the Act must focus upon the financial condition of the particular publication at issue, and that, 'danger of financial failure' must be addressed as a matter of probabilities, not certainties." Seattle Decision, 47 Fed. Reg.

26473 (1982). Reviewing the Attorney General's decision, the Ninth Circuit in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir. 1983), determined under a "commonsense construction" of the Act that "[t]he probable danger standard is, by the plain meaning of the words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" 704 F.2d at 478.

Proof of this condition requires something less than the stringent judicially created "failing company" standard used by the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 311 (1969),² but more than the "not likely to remain or become financially sound" definition used in the rejected Senate version of the Act. See *Hearst*, 704 F.2d at 474.

The position of the *Free Press* appears to find this middle ground. It plainly does not face external market forces - such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs - that would portend almost uncertain failure. Nor, as earlier indicated, do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial "downward spiral" that is fatal to survival.

At the same time, it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself (ALJ at 113). Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason

²Under *Citizen Publishing*, a "failing company" had to be on the brink of collapse, its prospects for reorganization dim or non-existent, and without any prospective non-competitive buyers before a JOA could be approved.

to assume that the *Free Press* would have failed long ago. ALJ at 70 (FF 91). Yet, KnightRidder invested substantial sums of money and resources on the gamble that in time the *Free Press* could gain market domination and become a profitable enterprise. Notably, this strategy did not contemplate that Detroit would continue with two profitable newspapers, only one. ALJ at 25-26 (FF 30, 31), and at 111-112. Knight-Ridder's counterpart, Gannett, embarked on its own market-domination strategy for the *News* with the same objective in mind. ALJ at 21 (FF 23), and at 111-112. Both have been frustrated. ALJ at 100 (FF 130).³

The argument is made that both papers should raise prices and discontinue advertising discounts. But the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate. ALJ at 75 (FF99), 77 (FF 101). There is thus no competitive advantage to be gained by Knight-Ridder from a unilateral increase in prices (ALJ at 81-82 (FF 110)); that market move must be accompanied by parallel price increases (and discount reductions) at the *News* if the papers have any chance of becoming profitable (ALJ at 87 (FF 115)).

Gannett has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with Knight-Ridder. ALJ at 80 (FF 107). While the Administrative Law Judge questioned the testimony of Gannett officials to this effect (*ibid.*), it hardly reflects unsound business judgment to retain awhile longer the *News'* current depressed pricing

³It is the case, as the Administrative Law Judge found (ALJ at 84 (FF 113), 87 (FF 115), and at 115, that the Detroit market *could* sustain two profitable newspapers *if* both circulation and advertising prices were increased. Nonetheless, both Knight Ridder and Gannett have elected to forego sharing the prize, resisting price increases in an effort to gain market dominance. ALJ at 19-21 (FF 21-23).

practices with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination.

This is not to suggest that undue weight attach to the testimony of Knight-Ridder's CEO, who promised to recommend a closing of the *Free Press* if the JOA application is disapproved. ALJ at 93-95 (FF 124). Yet that prediction cannot be wholly disregarded. It would be neither counterintuitive nor contradictory for Knight-Ridder to follow just such a course upon concluding, after all these years, that the *Free Press* no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses.

That is, after all, the market reality in Detroit under present circumstances. It is the condition that leads me to conclude that the "danger of financial failure" of the *Free Press* is not just speculative, or likely, but indeed "probable." And it is certainly the case that such a prospect for the newspaper pertains "regardless of its ownership or affiliations." Indeed, it appears at this stage that Knight-Ridder can, at best, only forestall the financial failure of the paper, not prevent it altogether.⁴ Yet, modest delay, particularly if associated with additional operating losses, does not alter the "probable danger of financial failure" determination.

There remains, of course, the additional question whether a decision favoring the proposed JOA will "effectuate the policy and purpose" of the Act. 15 U.S.C. 1801. I believe it will.

Undergirding the Act are two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving "editorially and reportorially independent and competitive" newspapers (15 U.S.C. 1801). Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly

in any given market. The alternative of a JOA is in the nature of a legislative trade-off: an incremental elimination of competition as to the newspapers' production activities in exchange for the assurance that the existing array of editorial and reporting voices will remain fiercely competitive and independent.

As discussed above, the *Free Press* has satisfactorily demonstrated that the danger of financial failure has moved well within the zone of "probability", and that no unilateral actions on its part can, without entirely improper collusion or collaboration with the *News*, reverse the unbroken pattern of annual operating losses. To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit. As the Administrative Law Judge found, this is not a situation where the *Free Press* has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement (ALJ at 114). *See also Seattle Attorney General Decision*, 47 Fed. Reg. at 26474. Keen competition aimed at market domination and future profitability — competition waged energetically but both responsibly and properly — has moved both newspapers into intractable loss positions from which only one, the *News*, now appears to have any reasonable prospect of emerging.

Faced with this stark reality, both Gannett and Knight-Ridder understandably looked to the alternative of a JOA as a means of retaining their separate and independent editorial voices. Congress opened the door to just this sort of response with passage of the Newspaper Preservation Act. Some have argued that, because the two papers openly pursued the JOA option over several years and saw it as a means of avoiding financial failure (ALJ at 34 (FF 44), and at 114), they should not be permitted to enter into such an arrangement. The suggestion is that the prospect of a JOA, not competition for

market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate discounting. See ALJ at 21 (FF 24), and at 114.

The evidence of record offers a much different picture, however. It makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade (ALJ at 18-21 (FF 18-23)), and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination. ALJ at 23-29 (FF 26-33). With the objective no longer within the grasp of either paper, recognition of the JOA as an available option, and the commencement of negotiations on such an arrangement, signals prudent management judgment. Certainly, newspapers cannot be faulted for considering and acting upon an alternative that Congress has created.

Here, approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit — an outcome that does not appear to be in the future otherwise. Perhaps it can be said that Congress failed to focus at the time of the statute's enactment on the particular situation confronting the *Free Press* and the *News*. Its frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the "downward spiral" phenomenon due to external market forces. But no less destructive of the dual objectives of preserving open competition and vigorous editorial debate is the financial failure of one of two newspapers that has been locked for almost a decade in a severely competitive struggle for market domination and suffered irreversible operating losses year after year. If a JOA provides an acceptable means of avoiding the monopoly market anticipated in the former situation, so, too, does its approval serve to "effectuate the policy and purpose"

of the Act when confronted with the near certain newspaper monopoly that will result in the latter circumstance.

Conclusion

Accordingly, on the basis of my review of the entire record before the Administrative Law Judge, the Recommended Decision, including its many findings and conclusions, and the responses thereto filed by the parties and interveners, I conclude that the proposed JOA of the applicants, the *Detroit News* and the *Detroit Free Press*, should be approved. In so concluding, I have accepted as accurate the fact findings of the Administrative Law Judge, but differed for the reasons stated with his ultimate conclusion as to where those facts lead.

For me, the continuing and persistent operating losses suffered by the *Free Press* over the course of nearly a decade, with no prospect of unilaterally reversing that economic condition in the foreseeable future, describes a newspaper "in danger of financial failure." Because its competitor leads in virtually all economic indices, is prepared (indeed committed) to continue its depressed pricing practices at levels below the *Free Press* in order to insure that the *News* maintains its circulation and advertising advantages, and undoubtedly has the ability on such terms to outlast the *Free Press*, the very real potential for failure becomes highly "probable."

That prospect satisfies the statutory standard permitting a limited exemption from the antitrust laws. In such circumstances, approval of the JOA well serves the policy and purpose of the Act.

Dated: August 8, 1988

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

Order

Upon consideration of the entire record and the applicable law, it is here by ordered that the Application by the *Detroit Free Press* and the *Detroit News* for approval of a Joint Operating Arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C.1801 *et seq.* is approved, said approval to become effective on the tenth day after the filing of this decision.

Dated: August 8, 1988.

/s/ *Edwin Meese III*
EDWIN MEESE III
Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, *et al.*,

Plaintiffs,

v.

Civil Action No. 88-2322

ATTORNEY GENERAL OF THE
UNITED STATES, *et al.*,

[September 14, 1988]

Defendants.

MEMORANDUM OPINION AND ORDER

This case is a challenge to a decision by former Attorney General Edwin Meese III to approve a joint operating agreement ("JOA") under the Newspaper Preservation Act ("NPA") of 1970, 15 U.S.C. §§ 1801-1804 (1982). The JOA would give the newspapers, the *Detroit Free Press* ("Free Press") and *The Detroit News* ("News"), limited exemption from antitrust laws.

Attorney General Meese granted the application for a JOA between the two newspapers on August 8, 1988. Eight days later, and two days before the JOA was to begin in operation, this suit was filed by plaintiffs, a group that includes individuals, advertisers, and newspaper employees who allege that they would be adversely affected by the JOA. On August 17, 1988, Judge Joyce Hens Green of this Court, sitting as motions judge, granted plaintiffs' motion to stay the effect of the Attorney General's decision until September 17, 1988. Judge Green held that "at this early stage of these proceedings the record sug-

gests the conclusion that the Attorney General's Decision and Order was arbitrary and capricious," but that "[u]pon a full ventilation of these matters a different conclusion might be reached." Opinion and Order Granting Stay at 15.

Pursuant to a schedule ordered by Judge Green, oral argument was heard on cross-motions for summary judgment on September 8, 1988. For the reasons stated herein, the Court grants defendants' motion for plenary summary judgment and will allow the stay to expire.

I. Background

The Detroit metropolitan area is the only urban center in the nation, save New York, with two general interest daily newspapers with circulations of more than 650,000 each. The Free Press, owned since 1940 by Knight-Ridder, Inc., the nation's second-largest newspaper group, and the News, run since 1986 by Gannett Co., Inc., America's largest newspaper organization, have engaged since roughly 1960 in what has been nicknamed "The Great Newspaper War." Unlike the numerous other news-print battles in American cities since World War II, however, the Detroit contest has not resulted in a clear winner and a clear loser. Indeed, since 1970 the Free Press has never captured less than 47 percent nor greater than 50 percent of the combined daily circulation market. By virtue of the newspaper war, the papers are the least expensive major dailies in the nation, both for buyers and advertisers, and Detroit has the highest per capita newspaper readership rate of any major metropolitan area.

By 1980, however, the management of each paper was deeply concerned that their publication would fall behind and suffer the fate of many other once-robust but now-extinct "second" newspapers. With each paper convinced that its publica-

tion could be the one to survive, each engaged in costly strategies to try to achieve "market domination." Each cut prices, discounted its advertising rates, and made significant capital investments, including the opening of a new printing plant by the Free Press in 1986.

Despite consistent profits during the 1970s, both publications have suffered operating losses throughout the 1980s, although those of the Free Press have been more consistent. On May 9, 1986, not long after Gannett purchased the News, the two newspapers petitioned the Attorney General for permission to work under a JOA, which includes a provision for only one newspaper to be published on weekends. Since then, the Free Press's losses have deepened, so that the paper now contends it is losing between \$34,000 and \$45,000 a day, even though circulation has not fallen off significantly.

After receiving the application for the JOA, the Attorney General in Charge of the Antitrust Division, then Douglas H. Ginsburg, who recommended on July 23, 1986 both that the application be denied and that the matter be presented to an administrative law judge ("ALJ"). Pursuant to 28 C.F.R. § 48.10 (1986), the Attorney General referred the matter to ALJ Morton Needelman, who conducted three weeks of evidentiary hearings. On December 29, 1987, Judge Needelman presented a 129-page Recommended Decision ("Recommended Decision") that including exhaustive findings of fact and again recommended that the JOA be denied. Attorney General Meese on August 8, 1988 issued a Decision and Order ("Decision and Order") granting the application for a JOA. Although he "accepted as accurate the fact findings of the Administrative Law Judge," Attorney General Meese "differed ... with his ultimate conclusion as to where those facts lead." Decision and Order at 14. Judge Green's order stayed the effect of the Attorney General's Decision and

Order, which otherwise would have permitted the JOA to go into effect under the NPA on August 18, 1988.

II. *The Newspaper Preservation Act*

Concerned over the failing of many "second" newspapers in major metropolitan areas in the 1950s and 1960s, Congress in 1970 enacted the Newspaper Preservation Act ("NPA"), 15 U.S.C. §§ 1801-1804 (1982). The NPA grants a partial antitrust exemption to newspapers that enter into a JOA, in which the newspapers that enter into a JOA, in which the newspapers merge their business operations and jointly set prices and advertising rates. At the same time, the editorial and reporting functions remain separate, so that two different newspapers, presumably with two fairly separate editorial voices, continue to be published.

The key requirement for the Attorney General's approval of a JOA is that one of the papers be a "failing newspaper," defined as a publication that, "regardless of its ownership or affiliations, is in *probable danger of financial failure*." 15 U.S.C. § 1802(5) (emphasis added). The "failing newspaper" test was clearly intended to replace the more stringent "failing company" defense for mergers generally permitted under antitrust law. Specifically, Congress wished to reverse the effects of *Citizen Publishing Co. v. United States*, 394 U.S. 131, 89 St.Ct. 927, 22 L.Ed.2d 148 (1969), in which the United States Supreme Court held that JOAs violated antitrust restrictions unless one publication was "on the verge of going out of business." *Id.* at 137, 89 S.Ct. at 930. The purpose of the NPA is to allow the partial merger of two newspapers before the failing one becomes too ill to revive. In the application for the Detroit JOA, the Free Press was offered as the "failing newspaper."

Under the NPA, a JOA with an antitrust exemption must get prior approval of the Attorney General, who may approve the JOA if "approval of such arrangement would effectuate the policy and purpose" of the act. 15 U.S.C. § 1803(b). The statute offers no further guidance to this broad latitude granted to the Attorney General; instead, the Department of Justice ("DOJ") has adopted rules to govern consideration of JOA applications. 28 C.F.R. pt. 48 (1987). The rules include provision for an administrative law judge ("ALJ") to make "recommendation" to the Attorney General. 28 C.F.R. § 48.10(d).

III. *Judicial Review*

Plaintiffs receive judicial review of the Attorney General's decision under the Administrative Procedure Act ("APA"), which directs the reviewing court to set aside agency action and conclusions when, among other situations, they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court may set aside agency action because it is "unsupported by substantial evidence" only in a case "reviewed on the record of an agency hearing *provided by statute*." *Id.* § 706(2)(E) (emphasis added). Since the NPA, does not provide for a hearing, only the "arbitrary" or "capricious" test is applicable here. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 140-41, 93 S.Ct. 1241, 1243, 36 L.Ed.2d 106 (1973) ("substantial evidence" test not used when a hearing is held pursuant only to agency regulations); *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1451 n. 7 (D.C.Cir.1985).

This Court takes the words "arbitrary" and "capricious" seriously, noting that they constitute a highly deferential standard of review that presumes the validity of authorized action

and requires affirmance if the action is supported by a rational basis. See, e.g., *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-21, 91 S.Ct. 814, 822-26, 28 L.Ed.2d 136 (1971). Moreover, although this Court must give a thorough examination to the reasons and the record, the Court is *not* entitled to substitute its judgment for that of the authorized official, even if the Court would have decided the other way under a weight of the evidence standard. See, e.g., *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823. Finally, the Court is mindful of the fact that the plaintiff has the burden of proving that the Attorney General's action fails under this standard.

IV. Applying the Arbitrary and Capricious Standard

Plaintiff's contention that the Attorney General's decision was arbitrary and capricious consists of three broad arguments. First, plaintiffs argue that the Attorney General was unreasonable in finding that the Free Press is a "failing newspaper" under the requirements of the NPA. Second, plaintiffs allege that the Attorney General was not entitled to give any substantial weight to crucial testimony supporting the notion that the Free Press was in imminent danger of failure. Third, plaintiffs maintain that the Free Press and the News cannot be allowed to take advantage of a JOA since the business strategies of the applicants have been in part improperly guided by the prospect of a JOA. Finally, plaintiffs also contend that there were improper ex parte contracts by defendants during the Attorney General's consideration of this matter. Plaintiffs' contentions fail on all four points.

1. The Failing Newspaper Standard

The plaintiffs' first argument challenges the Attorney General's finding that the Free Press is in "probable danger of financial failure," the test for a failing newspaper under the NPA. Plaintiffs maintain that the newspaper is not "failing," citing uncontested findings of the ALJ that the Free Press is not dominated by the News, that the Free Press is not in a "downward spiral" of circulation and advertising revenue, and that both the Free Press and the News theoretically could be profitable with higher circulation and advertising process. The Attorney General admitted that the Free Press does not meet the traditional scenario of a downward-spiraling failing newspaper, but concluded nonetheless that "the danger of financial failure claimed by the *Free Press* appears to be every bit as real" as if it were following the traditional scenario. Decision and Order at 6.

This Court cannot hold that the Attorney General was arbitrary and capricious in finding that the traditional downward spiral, although a common symptom of a "failing newspaper," is not necessary to prove a "failing newspaper." This Court keeps in mind that a reviewing Court must grant considerable deference to the interpretation and construction of a statute by the official authorized to administer it, even if there are more than one possible interpretation or construction. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Moreover, the Attorney General's position here is bolstered by the NPA's stated policy to "preserve [through JOAs] the publication of newspapers" that would otherwise fail. 15 U.S.C. § 1801 (1982). It would make little sense to hold that a newspaper should be denied a JOA and forced to close because of financial reasons simply because the publication had not entered a stereotypical "downward spiral."

The "failing newspaper" test must be, as the Attorney General noted, a matter of probabilities, not certainties. Indeed, the only appellate case construing the test held that the "probable danger" standard is, "by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.) (approving the Attorney General's decision to grant a JOA in Seattle), *cert. denied*, 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 228 (1983).

The Attorney General presented ample support, under the arbitrary and capricious standard, for his finding that the Free Press is both "suffering losses which more than likely cannot be reversed" and is in "probable danger of financial failure." The ALJ found, and the Attorney General noted, that the Free Press has suffered at least \$56 million in operating losses since 1980 (losses that have accelerated nearly every year), that there is *no* unilateral policy available that could extricate the Free Press from its loss situation, and that were it not for massive infusions of funds from its parent, Knight-Ridder, the Free Press would likely already have failed. The NPA instructs the Attorney General to consider the financial condition of the newspaper "regardless of ownership"—an order to view the newspaper as "a free-standing entity, as if it were not owned by a corporate parent." *Hearst*, 704 F.2d at 480. Since it is not disputed that the Free Press is caught in a serious loss position, with no unilateral way out, the Attorney General had sufficient support, under the "arbitrary" or "capricious" test, for his conclusion that the Free Press is in "probable danger of financial failure."

Plaintiffs rest their argument here on the prediction of the ALJ that if the JOA is denied, the News, which is also suffering losses, will raise its prices, the Free Press will quickly

follow, and both will once again bask in the sun of profitability. Plaintiffs also cite approvingly the findings of the ALJ about the long-term advantages of the Free Press and the consistent optimism of the Free Press management in the years before the JOA application was filed. Furthermore, plaintiffs argue, with some support from the ALJ, that the current losses of the Free Press are best characterized as a capital investment designed to reap future profits, should the Free Press become dominant.

These predictions about a bright future, however, must be tempered by three crucial points. First, the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon, considering that such a move would put at risk its narrow circulation advantage, which in turn could jeopardize its position as the financially healthier Detroit daily, and considering that the management of the News has stated that it has no intention of raising prices. Second, the ALJ's long-term speculation comes with no timetable and no guarantee of probability, and does nothing to change the Free Press's *current* status as in "probable danger of financial failure." A company may have decent long-term prospects and still fail, either because the long-term prospects are too uncertain or remote, or because short-term losses are too severe to continue to suffer. The NPA does not require that a newspaper publisher suffer massive losses by keeping the publication in business during unprofitable years simply because of the prospect of the future profitability. Third, even if the Free Press did make a significant capital expenditures in the hope of future profits, this fact does not prevent it from becoming a "failing newspaper" if the losses proved to be longer-lasting or more severe than anticipated, or if the hope for future profits now appears to be unwarranted. Indeed, even if the ALJ stated that the Free Press is stuck in a deficit position and that there is no unilateral

strategy it could follow to extricate itself. Accordingly, this Court finds that the Attorney General was not arbitrary and capricious in concluding that the Free Press is a "failing newspaper."

2. The Disputed Testimony

Although the current financial situation of the Free Press is adequate to support the Attorney General's conclusion, plaintiffs complain that the Attorney General improperly credited a crucial portion of the testimony before the ALJ of Alvah Chapman, Jr., chief executive officer of Knight-Ridder, Inc., parent of the Free Press. Mr. Chapman testified that he would recommend closing the newspaper if the JOA were not granted. Calling it a "bolt out of the blue," the ALJ discounted the testimony entirely, apparently viewing it as simply a strategic maneuver and a "threat," because there were no previous indications that the Free Press would follow such a drastic path. Recommended Decision at 93-94. The Attorney General disagreed with the ALJ's assessment, stating that it would be "neither counter intuitive nor contradictory for Knight-Ridder to follow such a course." Decision and Order at 10.

Testimony such as this is always problematic, as there is a great incentive to provide self-serving evidence. Were it clear that this testimony were a "bluff," the Attorney General should have discounted it accordingly. If the threat is real, however, the proper positions of the Attorney General and of the reviewing Court are not so clear, even if the decision to close the Free Press were made in hopes of swaying the JOA decision. On the one hand, the government should discourage potential manipulative decisionmaking on the part of newspaper publishers. On the other hand, a publisher can close its newspaper whenever it chooses— whether it is

justified in doing so because of financial losses, whether it does so because its "bluff" is called and it wants to preserve its credibility, or whether it is propelled *both by the pain of losses and the potential pleasure of JOA profits*.

In the instant case, fortunately, the Court does not need to grapple fully with these problems. The Attorney General concluded that the testimony should not be disregarded entirely— a conclusion bolstered by the undeniable fact of massive losses from which the Free Press cannot extricate itself unilaterally, and by the stake of Knight-Ridder, Inc., the nation's second-largest newspaper company, in its credibility and reputation. Even if the assessment of the ALJ were also reasonable, this Court cannot find that the Attorney General's decision to give at least some weight to the testimony of Knight-Ridder's CEO was unreasonable, arbitrary, or capricious.

3. The Motivations of the Newspapers

The third major argument of plaintiffs is that the JOA must be denied because the losses suffered by the Free Press are in part the result of a conscious strategy of forcing prices so low that it would either drive its competitor out of business or cause losses that would permit a JOA. Both the policy behind the NPA and the *Hearst* opinion justify the notion that purposely incurred losses should not be recognized in justifying a "failing newspaper." See *Hearst*, 704 F.2d at 478. Indeed, whenever government offers a benefit because of financial hardship—be it welfare applicant or failing newspaper—there is always an incentive for the potential recipient to either exaggerate or exacerbate its woes in order to receive the benefit.

Here, there is no dispute that the losses of the Free Press are real, nor that they have been incurred primarily as the

result of a bold strategy that the publication hoped would lead it to a dominant position in the Detroit market. Rather, the contention is more subtle; the suggestion of the ALJ was that both newspapers felt free to adopt bold strategies of price-cutting in an effort to gain market domination because they were secure in the belief that "failure too had its reward in the form of JOA approval." Recommended Decision at 114, 128.

The Attorney General's response to this allegation was disconcerting, in that it failed to address the subtlety of the dual motive issue. Rather, the Attorney General set up what amounts to a straw man by stating incompletely that the "suggestion is that the prospect of a JOA, not competition for market domination, was responsible" for the newspapers' current strategies. Decision and Order at 13. He then concluded that the record "makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade, and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination." *Id.* (citation omitted). Unless the word "principally" implicitly recognizes the dual motive argument, the Attorney General failed to address directly a key concern of both the ALJ and the chief of the Justice Department's Antitrust Division.

Nevertheless, this reviewing Court cannot conclude that the Attorney General, who is granted broad latitude under the NPA to effectuate the "policy and purpose" of the act, was arbitrary or capricious in finding that the Free Press's conduct did not disqualify it from a JOA. The ALJ's evidence shows that the prospect of a JOA played at most a secondary or supporting role in the newspapers' motivations. The Court believes that the policies behind the NPA would be best fulfilled by allowing a JOA when the newspaper's losses are *primarily*

the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail.

On one hand, newspapers should not be allowed, to quote the ALJ, to "engage in a whole panoply of risky strategies secure in the knowledge that the reward for failure—a JOA—may be just as valuable as, say, a successful attempt at monopolization." Recommended Decision at 122. On the other hand, the policies behind the NPA—saving newspapers that are failing after a goodfaith effort to keep them afloat—would *not* be fulfilled if a newspaper were forced to fail, without a JOA, when the predominant impetus behind the newspaper's strategy has been competition. It could be argued that this Court's policy may encourage "gambling" by newspapers in the future, but it will permit JOAs in situations where a city might otherwise lose a newspaper entirely.

In the Detroit case, the ALJ's findings, on which plaintiffs rely completely, show only a secondary role for the prospect of a JOA in the Free Press's strategic decisionmaking. Indeed, they suggest that the newspaper may have followed the same strategies had the JOA not been available. Considering this record, this Court cannot conclude that the Attorney General was arbitrary or capricious in finding that the newspaper's behavior was acceptable enough to qualify it for a JOA.

Finally, plaintiffs argue that the Attorney General's decision was flatly flawed because it was "internally inconsistent" in purporting to both accept the fact findings of the ALJ and disagree with the ALJ's findings about the newspapers' strategic motivations. This argument fails for two reasons. First, it is not clear that the Attorney General disagreed with the ALJ's fact findings as much as his inferences derived from facts. Second, since the Attorney General makes clear his view

that the newspapers were not engaged "principally" in ends other than competitive ones, the Court cannot fault him for a blanket phrase in his conclusion—not in his discussion—that he accepted the findings of fact. To overturn the Attorney General on this point would be review by semantic technicality.

4. Ex Parte Contacts

In their complaint, plaintiffs allege that the Attorney General was a target of unlawful ex parte contacts while he was considering the JOA application. Specifically, the plaintiffs contend that numerous letters were sent to the Attorney General, that the Attorney General discussed the JOA application at a meeting with a group of congressmen on June 7, 1988, and that the defendant publications engaged in a "public relations" campaign to achieve their goal of a JOA. In a signed declaration, former Attorney General Meese has rebutted each of these allegations first, he states that the Justice Department kept all ex parte letters away from him; second, he states that he refused to discuss the merits of the case at the June 7 meeting; third, he states that he never discussed the JOA with anyone outside of the Justice Department. As plaintiffs failed to add anything to their bald allegations in their motion for summary judgment and subsequent filings, the Court must grant defendants summary judgment on the ex parte issue.

V. Conclusion

It is not the duty of this Court to weigh the arguments of the ALJ in this matter against those of the Attorney General; the only authorized role for this Court under the NPA and APA is to determine whether the Attorney General's conclusions were arbitrary or capricious, using the ALJ's findings as a background record. The Court finds that the Attorney General

was not unreasonable in finding that the Free Press — a newspaper that has incurred, and will continue to incur, losses that would already have led to its demise were it not owned by large corporate parent — is a "failing newspaper," using the NPA definition of "probable danger of financial failure" and the *Hearst* standard of losses "not likely to be reversed." Furthermore, the Court finds that the Attorney General was not unreasonable in concluding that the Free Press was primarily motivated by competitive aims, not a JOA, in its recent business strategies. Therefore, this 14th day of September, 1988, plaintiffs' motion for summary judgment is hereby DENIED, defendants' motion for plenary summary judgment is hereby GRANTED, and the stay on the Attorney General's Decision and Order will be allowed to expire on September 17, 1988 at 7:15 p.m.

/s/ George H. Revercomb

George H. Revercomb, Judge

9/14/88

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-5286

**September Term, 1988
D.C. Civil No. 88-02322**

United States Court of Appeals
for the District of Columbia Circuit

Michigan Citizens for an Independent
Press, et al., Appellants

FILED JAN 27 1989

v.

CONSTANCE L. DUPRE
CLERK

Richard Thornburgh, United States
Attorney General, et al.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

Before: ROBINSON, RUTH B. GINSBURG and
SILBERMAN, Circuit Judges

J U D G M E N T

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre, Clerk
Constance L. Dupre, Clerk

Date: January 27, 1989

Opinion for the Court filed by Circuit Judge Silberman.
Dissenting opinion filed by Circuit Judge Ruth B. Ginsburg.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 28, 1988 Decided January 27, 1989
No. 88-5286

MICHIGAN CITIZENS for an INDEPENDENT PRESS, et al.,
APPELLANTS

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.

Appeal from the United States District Court
for the District of Columbia
(C.A. No. 88-02322)

William B. Schultz, with whom *David C. Vladeck* and *Alan B. Morrison* were on the brief, for appellants.

Clark M. Clifford, with whom *Robert A. Altman*, *Robert P. Reznick*, *Philip A. Lacovara* and *Gerald Goldman* were on the brief, for appellee The Detroit Free Press, Inc.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Douglas Letter, Attorney, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, were on the brief for appellee Thornburgh, Attorney General, et al. *Robert K. Kopp* also entered an appearance for the Attorney General.

Lawrence J. Aldrich, *John Stuart Smith*, and *Gordon L. Lang* were on the brief for appellee The Detroit News, Inc.

Paul L. Friedman and *Anne D. Smith* were on the brief for amicus curiae Little Rock Newspapers, Inc. urging reversal.

W. Terry Maguire and *Claudia James* were on the brief for amicus curiae American Newspaper Publishers Association urging affirmance.

Before: ROBINSON, RUTH B. GINSBURG, and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* RUTH B. GINSBURG.

SILBERMAN, *Circuit Judge*: This case presents a challenge to a decision and order of the Attorney General, pursuant to the Newspaper Preservation Act ("NPA"), 15 U.S.C. 1801-1804 (1982), approving a joint operating arrangement between the Detroit Free Press and Detroit News newspapers. Appellants, which include Michigan Citizens For An Independent Press,¹ seven individuals,² and the interest group Public Citizen, brought suit

¹ At the time this suit was filed, Michigan Citizens For An Independent Press had twenty members who either read, purchase classified advertising in, or are employed by one of the newspapers.

² The seven individual plaintiffs include persons who purchase advertising in the papers and allege that advertising prices will rise if the JOA is approved.

against the Attorney General and the two newspapers in the district court alleging that the Attorney General's decision violates the NPA and the Administrative Procedure Act, 5 U.S.C. § 706 (1982), because it is not based on substantial evidence, is arbitrary and capricious, and is otherwise in violation of law. The district court granted summary judgment in favor of defendants, and plaintiffs appealed to this court. We conclude that the Attorney General's decision was based on a permissible construction of the statute, and that his application of the legal standard to the facts of this case was not arbitrary, capricious, or an abuse of discretion. We therefore affirm the judgment of the district court.

I.

A.

Congress passed the Newspaper Preservation Act in 1970 with the stated purpose of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. The Act creates an exemption to the antitrust laws that permits a joint newspaper operating arrangement ("JOA")³ between two newspapers if the Attorney

³ The Act defines a "joint newspaper operating arrangement" as "any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing, time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, that there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2).

General determines that one of the papers is "a failing newspaper" and that the arrangement will "effectuate the policy and purpose" of the Act. 15 U.S.C. § 1803(b).⁴ A "failing newspaper" is defined as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).

The first joint newspaper operating arrangement was started by three newspapers in Albuquerque, New Mexico in 1933, and by 1966 there were twenty-two JOAs in effect. In 1964, the Department of Justice initiated an investigation of newspaper JOAs, and in 1965 it sued the publishers of two daily newspapers in Tucson, Arizona, which operated jointly, for violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and section 7 of the Clayton Act, 15 U.S.C. § 18. The trial court in that suit found violations of all of those provisions, and the Supreme Court upheld that finding in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

The Court rejected the newspapers' argument that the so-called "failing company" defense—a judicially created doctrine—absolved them from liability under the antitrust laws. *Id.* at 137-38. Under the "failing company" doctrine, conduct which would otherwise violate antitrust laws does not do so if one of the suspect businesses "faced the grave probability of business failure." *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930). The doctrine

⁴ The entire provision reads as follows:

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

is based on the notion that a merger between two competitors, one of which is failing, cannot have an adverse effect on competition, because the failing company would disappear as a competitive factor whether or not the merger occurred.

In *Citizen Publishing*, the Court narrowly confined the scope of the doctrine. It held that a financially troubled company may not employ the "failing company" defense unless it meets three conditions. The disputed merger may be sought only when the owners of the "failing" company are contemplating liquidation; indeed, the JOA must be the "last straw" at which the company can grasp. 394 U.S. at 137. The defendants are required to establish that the company that acquires the failing company is "the only available purchaser," *id.* at 138, and finally, the prospects for successful reorganization under the bankruptcy laws must be "dim or nonexistent." *Id.* Because the Tucson papers did not make such a showing, their JOA violated the Sherman Act.

Congress reacted to *Citizen Publishing* by passing the Newspaper Preservation Act, which established a less stringent test for newspapers seeking a JOA. S. REP. No. 535, 91st Cong., 1st Sess. 4 (1969). Congress did not question the Court's reasoning in defining the failing company doctrine, but it felt that "the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses." *Id.* As the Senate Judiciary Committee noted, "when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer." *Id.* The NPA therefore provides that a newspaper is "failing" and eligible for a JOA when it is "in probable danger of financial failure." 15 U.S.C. § 1802 (5). The statute also includes what Congress meant to be a less strict standard for JOAs already existing in 1970. H.R. REP. No. 1193, 91st Cong., 2d Sess. 10 (1970). A pre-statute JOA is not unlawful if at the

time at which such arrangement was entered into, not more than one of the newspapers involved was "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

Since 1970, four new JOAs have been approved and implemented.⁵ In each of those cases, unlike the Detroit case, the "failing newspaper" was well into what in the newspaper industry is known as the "downward spiral." The fate of a struggling newspaper is thought to be determined by the close interrelationship between circulation and advertising revenues. Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper that is short on advertising, so circulation drops further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure. The only court to address the Act, *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), concluded that a newspaper in the downward spiral satisfies the "probable danger of financial failure" test, as long as it had followed reasonable management practices. *Id.* at 479.

B.

The Detroit Free Press and the Detroit News are daily newspapers that compete in Detroit, which is the nation's fifth largest newspaper market. The papers are owned by the two largest news organizations in the United

⁵ Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of Joint Operating Arrangement, 417 Fed. Reg. 26,472 (1982); Newspaper Operating Arrangement—Times Printing Co., and the Chattanooga News-Free Press Co., 45 Fed. Reg. 58,733 (1980); Cincinnati Post and Cincinnati Enquirer, Approval of Joint Operating Arrangement, 44 Fed. Reg. 68,537 (1979); Anchorage Daily Times and the Anchorage Daily News: Findings on Application for Approval of Joint Operating Arrangement, 39 Fed. Reg. 41,754 (1974).

States; Knight-Ridder, Inc. owns the Free Press, and the Gannett Company has controlled the News since February 1986, when it purchased the paper from the Evening News Association. Over the past fifteen years, the papers have been engaged in fierce competition for absolute dominance of the Detroit market, which was motivated, at least initially, by the knowledge that many junior papers have been unable to survive as the second paper in metropolitan area competition.

This bitter fight has led to large operational losses by both papers. The Free Press has lost money every year since 1979, and it lost over \$10 million per year from 1981 to 1986. The News has sustained operational losses since 1980, and it lost over \$50 million between 1981 and 1986. A circulation price war has driven the daily prices in Detroit to twenty cents for the News and fifteen cents for the Free Press—probably the lowest daily prices in the United States. In recent years, the News has maintained a consistent circulation lead of approximately 51% to 49%. Perhaps more important, the News has continuously maintained more than a 60% share of total full-run advertising lineage.

As a result of their losses, the papers began to consider the alternative of a JOA as early as 1980 when the chief executive officers of Knight-Ridder and the Evening News Association first discussed the possibility. Negotiations continued sporadically from January 1981 to January 1984, but no agreement was reached during that period. In August 1985, Gannett agreed in principle to purchase the News from the Evening News Association, and senior officials of Gannett and Knight-Ridder thereafter met 16 times between August 1985 and April 1986 to shape the final agreement. On April 11, 1986 the News and the Free Press executed the JOA.

The agreement, which has an initial term of 100 years, provides—as is typical—that the news and editorial staffs

of the two papers are to remain independent and insulated from influence by the other party to the arrangement. The Free Press would publish a morning paper on Monday through Friday, and the News would print a corresponding afternoon edition. On Saturday and Sunday, the parties would publish only one paper, with each paper assuming separate editorial and news responsibilities.

During the first three years of the JOA, the News would receive 55% of the profits of the combined enterprise, while the Free Press would receive 45%. In the fourth and fifth years, the profit split would reduce to 53%/47% and 51%/49%, respectively. Beginning in the sixth year, the profits and losses would be shared equally by the News and the Free Press.

On May 9, 1986, the two papers applied for approval of the JOA by the Attorney General as required by the Act, and the application was referred to the Assistant Attorney General in charge of the Antitrust Division, pursuant to Justice Department regulations. See 28 C.F.R. § 48.7 (1988). The then Assistant Attorney General, Douglas H. Ginsburg (now Judge Ginsburg), issued a report on July 23, 1986, concluding that the applicants had “not yet sustained their burden of proof of showing that the Detroit Free Press is a ‘failing newspaper’ within the meaning of the Act and that approval of the application would effectuate the policy and purpose of the Act.” However, he did not advise disapproval of the application; instead, he recommended that the Attorney General order that a hearing be held before an administrative law judge to resolve material issues of fact raised by the application. See 28 C.F.R. § 48.7(b)(2) (1988).

Attorney General Edwin Meese followed his Assistant Attorney General's advice and pursuant to the Justice Department's regulations, 28 C.F.R. § 48.10, an administrative law judge was appointed to conduct the hearing. On December 29, 1987, ten months later, the ALJ issued

a decision, recommending that the application be denied. He concluded, *inter alia*, that the applicants had failed to prove that there exists in Detroit an irreversible market condition that will probably lead to the failure of the Free Press. According to the ALJ, the Free Press is not dominated by the News and the Free Press is not in a downward spiral toward failure. He instead attributed the losses incurred by the Free Press and the News to "their strategies of seeking market dominance and future profitability at any cost along with the expectation that failure to achieve these goals would result in favorable consideration of a JOA application."

The ALJ did not deny that the fiercely competitive strategies employed by both papers were perfectly rational, given the disastrous history of junior papers in the United States. But he believed that each paper had an eye on a potential JOA application in the event that it turned out to be the loser. They both saw the JOA as a safety net, in other words, and were thereby encouraged to engage in particularly risky competitive acrobatics.

Indisputably, the News was leading the Free Press in most of the circulation, revenue, and advertising lineage figures used to measure the relative positions of rival newspapers. The ALJ maintained, however, that the Free Press was within "striking distance" of the total circulation lead, and that the News' advertising lead was "vulnerable" to a change in the circulation lead. Neither paper could achieve profitability as long as they both pursued the current price war, but he believed that the record did not support the conclusion that "reader and advertiser demand in Detroit is so inadequate that the market cannot sustain two profitable papers irrespective of changes in pricing policies." He hypothesized that Detroit could sustain two profitable papers if the Free Press and the News both raised circulation and advertising prices. Still, he recognized that since "neither the

Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability."

The ALJ accepted the testimony of the Antitrust Division's expert, who calculated that the 50/50 profit split (after five years) represented a perception by Gannett that it could not achieve domination of the market for "at least seven years." He was, moreover, unpersuaded by Gannett officials' testimony that if the JOA were denied, they would *not* raise circulation prices, and he found "contemporaneous evidence" indicating that "absent a JOA Gannett may eventually initiate circulation price increases." He also assigned "little weight" to testimony from Knight-Ridder's CEO that he would close down the Free Press if the JOA application were denied. Essentially, the ALJ predicted that if the JOA were denied, the News would give the Free Press sorely needed relief by raising the News' circulation and advertising prices, thereby allowing the Free Press to follow suit.

Attorney General Meese, in his opinion of August 8, 1988, disagreed with the conclusions of the ALJ and granted approval of the JOA. The Attorney General "accepted as accurate the fact findings of the Administrative Law Judge," but differed with his "ultimate conclusion as to where those facts lead." Adopting the legal standard enunciated by the Ninth Circuit in *Hearst* the Attorney General asked: "Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 478 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). The Attorney General decided that the answer was yes: the Free Press had met its burden of proof, because it had suffered persistent operating losses over nearly a

decade and had no prospect of unilateral action to reverse those losses.

Central to the Attorney General's opinion was his disagreement with the ALJ's prediction of future behavior by the two papers in the event that the JOA is denied. He noted and accepted the ALJ's finding that the News was in a stronger competitive position according to all major economic indices. But he determined—or more accurately predicted—that if the News continues its current pricing practices, it “undoubtedly has the ability on such terms to outlast the Free Press.” Given this premise, the Attorney General found persuasive Gannett's testimony that it would continue its current competitive policies (and not raise prices), which he said “hardly reflects unsound business judgment.” Similarly, the Attorney General felt that the testimony of Knight-Ridder's CEO concerning a possible closure of the Free Press “cannot be wholly disregarded,” because it would be “neither counterintuitive nor contradictory” for Knight-Ridder to discontinue the paper if it concluded that it could not outlast the News in a prolonged price war.

In response to the allegation that the papers had pursued their competitive strategies *because* of the potential of a JOA, the Attorney General read the record as showing that Knight-Ridder was not “*principally* pursuing any end other than market domination.” (emphasis added). Moreover, he noted that “newspapers cannot be faulted for considering and acting upon an alternative that Congress had created.”

II.

Appellants allege that the Attorney General's determination is invalid both because it is based on an impermissible interpretation of the statute and is ar-

bitrary or capricious.⁶ As is not unusual in appeals from agency actions, the claims are interrelated. At the core of appellants' case is the assertion that the Attorney General could not legally grant approval for a JOA because the Detroit Free Press was not in a tough enough spot to qualify as “in probable danger of financial failure.” Whether the Attorney General legally decided that the Free Press did meet the statutory standard in turn depends to a large extent on whether his prediction of the newspapers' future course (if he did not approve the JOA) was reasonable. The Attorney General's interpretation of the probable danger of financial failure test draws content from the factual showing that he requires to meet that test. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987) (ambiguous statutory terms “can only be given concrete meaning through a process of case-by-case adjudication”). And there is no question in our mind that if the Attorney General's statutory interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43

⁶ Appellants argue at some length that parts of the decision should be reviewed under the “substantial evidence” test of section 706(2)(E) of the APA rather than the “arbitrary or capricious” standard, because the Attorney General based his conclusions on a record compiled after a formal hearing. The substantial evidence test applies, though, only in cases where “an agency hearing [is] provided by statute.” 5 U.S.C. § 706(2)(E) (1982); see *CNA Financial Corp v. Donovan*, 830 F.2d 1132, 1153 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *Maryland Dept. of Human Resources v. Department of HHS*, 763 F.2d 1441, 1451 n.7 (D.C. Cir. 1985). The Newspaper Preservation Act does not require that a hearing be held; a hearing is provided for only in the Justice Department's regulations. 28 C.F.R. § 48.10 (1988). In any event, we reiterate that in the view of this court, the “meaning of the ‘substantial evidence’ terminology connotes a substantive standard no different from the arbitrary or capricious test.” *Association of Data Processing Orgs., Inc. v. Board of Governors*, 745 F.2d 677, 685 (D.C. Cir. 1984).

1984), because we are certainly unable to discern a specific congressional intent governing this case.

Not surprisingly, the exact meaning of the linguistically imprecise phrase "probable danger of financial failure" is not apparent from the statute or the legislative history. The Senate bill, which differed slightly from the House version, "defined" a failing newspaper as one "in danger of probable failure." The Senate took this phrase—or at least the words "probable failure"—from the Bank Merger Act, 12 U.S.C. § 1828(c) (3) (1982), recognizing that the phrase was informed by the Supreme Court's decision in *United States v. Third National Bank*, 390 U.S. 171 (1968). S. REP. NO. 535, 91st Cong., 1st Sess. 2 (1969). The House version, which was eventually adopted, used the clause "probable danger of financial failure" as the standard for new JOAs (emphasis added). Despite its minor difference from the Senate version, the chief House sponsor of the bill explained that "[t]he term 'probable danger of financial failure' . . . comes out of the Bank Merger Act," and "is understood by the courts in the field." 116 Cong. Rec. 23,146 (1970) (statement of Rep. Kastenmeier). The Supreme Court had held in *Third National Bank* that where managerial deficiencies are responsible for a bank's financial problems, the banks, in order to prove "probable failure," must establish that improved management could not achieve profitability. 390 U.S. at 190. More generally, the parties seeking the merger must "reliably establish the unavailability of alternative solutions" to the financial woes of the failing bank. *Id.* Thus, strong evidence of probable failure was required.

To be sure, the Attorney General had not previously faced a case such as this. Prior approvals of JOAs had always involved at least one newspaper that had actually entered the downward spiral, whereas the Detroit Free Press could be said to be poised on the brink of the spiral, its future dependent on the competitive behavior

of the *News*.⁷ Still, the only prior case reviewing an Attorney General's approval of a JOA—the pre-*Chevron* decision of the Ninth Circuit in *Hearst*—phrased the question before the Attorney General in broader terms than whether one of the newspapers had entered a downward spiral. The court asked: "Is the newspaper suffering losses which more than likely cannot be reversed?" This interpretation of the statutory language, which the court called a "commonsense construction," *id.* at 478, was explicitly adopted by the Attorney General in this case, and thus made his own interpretation entitled to *Chevron* deference. Only for cogent reasons would we reject as unreasonable an interpretation of a statute that a sister circuit had considered a commonsense construction.

The Ninth Circuit thought implicit in its inquiry was an examination of alternative forms of relief for the putatively failing newspaper. Was there, for example, a group of interested buyers or a potential for improved management? Congress' reference to the *Third National Bank* case in the legislative history of the statute suggested to the Ninth Circuit that Congress intended the Attorney General to consider alternatives to a JOA before approving an application. We quite agree, but so apparently did the Attorney General. He concluded that if no form of relief was within the control of the sick newspaper—its survival depended only on improbable behavior by its competitor—the statutory test was satisfied. Appellants artificially construe the Attorney General's decision to permit a JOA without regard to con-

⁷ Appellants deny that they claim that only a newspaper in a downward spiral may qualify under the statutory test. But their argument seems necessarily to imply just that, since it is based on the notion that the Free Press' losses and the News' continued strength in circulation and advertising are not sufficient objective factors to support the Attorney General's decision.

sideration of the competitors' behavior, but that is not what the Attorney General said.

The dissent suggests that the Attorney General's statutory construction is impermissible because it did not employ the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). Certainly, courts interpreting the antitrust statutes have often employed that canon. See, e.g., *Hearst*, 704 F.2d at 473 (“Our review of the Newspaper Preservation Act and its interpretation by the Attorney General is guided by [the] additional rule . . . [that] exemptions to the antitrust laws are to be narrowly construed.”).⁸ But *Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another.

We do not mean to say that canons of construction are completely irrelevant in the post-*Chevron* era. If employment of an accepted canon of construction illustrates that Congress had a *specific* intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987) (“ordinary canons of statutory construction” provided “compelling” evidence that Congress intended “well-founded fear or persecution” standard to be different from “clear probability of persecution.”). For example, if Congress banned the

⁸ The pre-*Chevron* decision of the *Hearst* court did mention deference, 704 F.2d at 473, but does not seem really to have deferred to the Attorney General's construction.

importation of apples, oranges, and bananas from a particular country, the canon of *expressio unius est exclusio alterius* might well indicate that Congress *did not* intend to ban the importation of grapefruits. In that event, an agency decision to ban grapefruits would be contrary to Congress' specific intent. As a corollary, we held in *American Fed'n of Gov't Employees v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986), that the FLRA's interpretation of the Federal Service Labor-Management Relations Statute was impermissible because it “ignore[d] the familiar canon that statutes should be construed ‘to give effect, if possible, to every word Congress used.’” The FLRA's construction had resulted in “an effective repeal” of part of the statute, *id.* at 1529, and thereby frustrated the intent of Congress.

In this type of case by contrast, the Attorney General is called upon to balance two legislative policies in tension: The pro-consumer direction of the antitrust laws and a congressional desire embodied in the Newspaper Preservation Act that diverse editorial voices be preserved despite the unique economics of the newspaper industry. This is precisely the paradigm situation *Chevron* addressed. If the agency's choice “represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). To invoke the normal canon of construction is merely to say that the Attorney General put too much weight on the policy of preserving editorial diversity. We are not now after *Chevron*—if we ever were—permitted to accept such an argument.

Appellants argue that the Attorney General should receive less deference than *Chevron* requires, because “his interpretation of the statute was different from that

of the Antitrust Division, where the Justice Department's expertise on the Newspaper Preservation Act resides." We have previously rejected the notion that *Chevron* deference is based solely on agency expertise. *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988); *Cablevision Systems Dev. Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 608-09 (D.C. Cir. 1988). The rationale of *Chevron* is also grounded in the principle that the political branches of government, rather than the judiciary, should make policy choices. *Chevron*, 467 U.S. at 865-66.

Nevertheless, our dissenting colleague seems to accept the argument, since she relies heavily on the Antitrust Division's brief submitted to the ALJ. Dissent at 2 n.3, 4 n.5, 6 n.6. It is not surprising that the Division—charged with the front line responsibility for enforcing the antitrust laws—sought a narrow interpretation of sections 1802(5) and 1803(b). Congress, however, did not place responsibility for reconciling the conflicting policies and values called for in this type of case upon the Antitrust Division, but rather on the Attorney General, who might be thought to have a broader perspective.

It is also suggested, dissent at 4-5, that the Attorney General's decision is legally defective because he did not explain his interpretation of the conceptual difference between the section of the statute that applied to this transaction and the section that did *not* apply. The latter, section 1803(a), governs the legality of pre-statute JOAs and is more lenient because a JOA is authorized if, when entered into, not more than one of the newspapers involved was "likely to remain or become a financially sound publication." We do not understand our dissenting colleague to argue that the Attorney General's interpretation of section 1803(b) necessarily overlaps section 1803(a). A financially sound publication might, for instance, be defined as one that is consistently profitable, indeed, profitable enough to recover its cost

of capital. That is worlds away from a newspaper that is "suffering losses which more than likely cannot be reversed." The dissent contends, instead, that the Attorney General was obliged to draw the exact boundaries between the two sections when applying only the one. That seems to us to require an agency to decide cases not before it, to offer dicta that we normally eschew. We know of no authority that would support such a holding.

III.

Even if the Attorney General is statutorily authorized to treat a newspaper as in probable danger of failing before it actually enters the downward spiral, appellants claim that the Attorney General's decision was arbitrary and capricious because not rationally connected to the facts before him. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)) (agency must articulate a "rational connection between the facts found and the choice made"). This, as we have noted, is in essence a challenge to the reasonableness of the Attorney General's determination that the News had the economic power to outlast the Free Press and was not likely to reduce competitive pressure by raising prices.

The only specific challenge, as far as we can determine, to the Attorney General's appraisal of the respective competitive strengths of the two newspapers is based on the different opinion of the ALJ (and the Antitrust Division's brief to the ALJ). It is true that the Attorney General's crucial conclusions that the Free Press "has no realistic prospect of outlasting the News given the latter's substantial advertising and persistent circulation lead" and that the News "undoubtedly has the ability . . . to outlast the Free Press" was predicated on the ALJ's findings recounting the News' lead in all major indices. It is also true that the ALJ went on to offer

a somewhat different conclusion: that the Free Press was still within "striking distance" of the News and the latter's lead was "vulnerable." The Attorney General would not, however, be legally obliged to conform his judgment to that of a statutorily-required ALJ,⁹ much less this one, who was employed as a matter of discretion rather than law. See 28 C.F.R. § 48.8 (1988). Both men relied on the very same facts to make different evaluations of the competitive strength of the Free Press. But, it is only the Attorney General's conclusions that have legal significance, and we cannot say that his determination is unreasonable. It is undisputed, after all, that the News has maintained the lead for a long time and that the Free Press had suffered extensive losses. Debatable, the Attorney General's appraisal may well be, but hardly unreasonable.

Similarly, appellants rely on the ALJ's contrary prediction to dispute the Attorney General's conclusion that the News would *not* release the pressure on the Free Press by raising prices if the JOA were disapproved. Gannett officials testified that they had no intention of raising prices regardless of the Attorney General's decision. The ALJ refused to credit this testimony, not on account of the witnesses' demeanor, but because he, the ALJ, thought that course would only cause more losses for the News and was therefore irrational.¹⁰ Cf.

⁹ The APA explains that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). "[I]n the last analysis it is the agency's function, not the [ALJ's], to make findings of fact and select the ultimate decision." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁰ The ALJ said:

Newarth and other Gannett officials testified that without a JOA they will not raise circulation prices since

Universal Camera Corp. v. NLRB, 340 U.S. 474, 494-95 (1951) ("The significance of [the ALJ's] report . . . depends largely on the importance of credibility in the particular case."). The Attorney General's judgment of the News' likely future behavior was premised on his determination, which we have already found reasonable, that the News had the competitive strength to outlast the Free Press.¹¹ The ALJ never squarely found otherwise,¹²

they intend to maintain pressure on the Free Press as they seek market domination. This strategy received the endorsement of Applicants' retained expert. But Gannett officials and retained expert never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies. As it happens, contemporaneous evidence indicates that absent a JOA Gannett may eventually initiate circulation price increases as the way to return the News to profitability. (citations omitted).

¹¹ The Attorney General wrote:

The argument is made that both papers should raise prices and discontinue advertising discounts. But the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate. There is thus no competitive advantage to be gained by Knight-Ridder from a unilateral increase in prices; that market move must be accompanied by parallel price increases (and discount reductions) at the *News* if the papers have any chance of becoming profitable.

Gannett has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with Knight-Ridder. While the Administrative Law Judge questioned the testimony of Gannett officials to this effect, it hardly reflects unsound business judgment to retain awhile longer the *News*' current depressed pricing practices with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination. (citations omitted).

¹² The ALJ did predict at one point that the Free Press would "not enter the downward spiral so long as Knight-Ridder remains in Detroit." This view, however, seems to

and if the News had such strength, we do not see how the Attorney General's projection can be deemed unreasonable. Under those circumstances, Gannett's refusal to raise prices, as the Attorney General said, "hardly reflects unsound business judgment."

Knight-Ridder seems to have thought that its competitor's strategy was rational, since its CEO testified that if the JOA were disapproved, the Free Press would close down. The ALJ again assigned "little weight" to that testimony, because "if a Free Press closure was imminent, it would have made no economic sense for [the News] to agree to share prospective JOA profits with [the Free Press]." Also, he stressed that an anti-trust division expert had testified that the terms of the profit split (reaching 50/50 after five years) suggested that Gannett thought the Free Press would remain in existence for seven to ten years. The difficulty with the ALJ's analysis is that he equated the parties' bargaining positions prior to submission of a proposed JOA with their strategies after a rejection by the Attorney General. Prior to agreement, the Free Press had every incentive to convince the News that it would compete

rely on the notion of a "deep pocket" supporting the paper, which is an impermissible consideration under the NPA, 43 U.S.C. § 1802(5), *but see* dissent at 2, and furthermore irrelevant in light of basic principles of economics. *See* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 270 (1981) ("[N]o theory of predation has explained *why* victims should lack access to capital There is no reason why the capital market should refuse to supply funds to the victim.").

He also projected that "[i]f the struggle continues, there is no convincing evidence that superior scale economies is [sic] likely to be determinative for the News." The import of this theory is unclear to us, because the downward spiral that leads to the demise of competitors in the newspaper industry is a phenomenon quite different from the traditional concept of advantageous economies of scale and apparently unique to this industry. *See supra* at 5-6.

fiercely, and indefinitely into the future: Damn the losses; full speed ahead. Only by emphasizing its potential longevity could the Free Press extract favorable terms in a JOA. Thus, the Attorney General described the situation as the parties entered into the JOA, as a "competitive stalemate" with market domination "no longer within the grasp of either paper." But, that the News was willing to negotiate peace terms (the JOA) does not belie the Attorney General's appraisal of its fundamental superior strength. After this proceeding, in which all cards are placed on the table, it is wholly unrealistic to assume that the parties will return to the game and play it as if this proceeding had never occurred. If a JOA were denied, the News would have every incentive to force the Free Press to the wall; even if it took seven years to win, at the end of that period the News would have a monopoly. And, if the Free Press were doomed to defeat in the long run, it was not only reasonable but optimal for the paper to close immediately.

The Attorney General had to consider which of the two papers would blink first in the event the JOA were *denied*. Gannett said that it would not, and Knight-Ridder said that it would. Appellants assert that it was unreasonable for the Attorney General to believe them, because the more likely event was the exact reverse: that if the JOA were denied, Gannett would raise prices and the Free Press would remain in business. The Attorney General, it would seem, did not want to play the high stakes regulatory game that his ALJ proposed. He obviously was concerned that if he gambled on the ALJ's prediction that both newspaper were bluffing, Detroit would lose a newspaper. That is not to say that the Attorney General should put undue stress on self-serving declarations by newspaper executives seeking a JOA. But here, the statements that the Attorney General credited follow a long period of bitter competition. For the

News to stay the course, as for the British and French in 1917, promised absolute victory.

It may well be, as appellants argue and the ALJ found, that under ideal circumstances, Detroit could support two newspapers. The same could also be true of many cities that have lost competing newspapers and now one newspaper monopoly towns. It is not at clear whether the newspaper business in some cities a natural monopoly, and, if so, in cities of what size. This sort of speculation, it seems to us, as it did to the Attorney General, is hardly conclusive. That an omniscient Detroit newspaper czar could set circulation and advertising prices that would permit both papers to return to profitable status is not a useful observation in this context. The Attorney General is required to determine what will actually happen in Detroit if his approval is withheld. It would, moreover, be anomalous for those responsible for enforcing the antitrust laws to try to guide and calibrate the competitive zeal of the two newspapers so as to reach that level of competition at which both newspapers could be profitable.

Appellants might also be understood to complain that the Attorney General did not provide a reasoned explanation for his decision, because his only citations to the record at certain crucial points were to portions of the ALJ's opinion that reached different conclusions based on the same facts. Of course, the decision of the ALJ is part of the record and must be considered by the court when it determines whether the Attorney General's ruling is supported by substantial evidence or, in this case, arbitrary or capricious. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). We have said that an agency must both express an awareness that it is disagreeing with an ALJ and set forth the basis of the disagreement. *Local 441, IBEW v. NLRB*, 510 F.2d 1274, 1276 (D.C. Cir. 1975); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970),

cert. denied, 403 U.S. 923 (1971). To reverse the Attorney General, however, for failure to state at the exact point of the citations the obvious nature of his disagreement with the ALJ would be excessive judicial nitpicking. His difference with the ALJ is clear throughout the opinion, and although "[t]he explanation may have been curt, . . . it surely indicated the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

* * *

The real difficulty with this case—the factor that quite plainly underlies the ALJ's discomfort as well as appellants' quarrel with the Attorney General's decision—is the effect that the prospect of a JOA has on the behavior of competing newspapers. *See also* dissent at 5. It is feared that the statute authorizing a JOA creates a self-fulfilling prophecy. Newspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing.

Appellants argue that the Attorney General inadequately considered whether or not "critical aspects of the newspapers' conduct were influenced by the prospect of obtaining a JOA." But his opinion addressed this "dual motive" concern at some length; he observed that this was not the classic case that had worried Congress, where a newspaper had "brought itself to the brink of financial failure through improper marketing practices or culpable management." Instead, the record of years of fierce competitive and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA. Nevertheless, the Attorney General implicitly recognized that it would be impossible completely to preclude competing newspapers from factoring into their business strategy the prospect of a JOA. As he laconically put it, "newspapers cannot be faulted

for considering and acting upon an alternative that Congress has created.”¹³

We can envision a perfectly rational different policy, one that would require a showing that the weaker paper was more bloodied before approving a JOA and therefore *might* discourage the sort of competition we saw in Detroit. Congress, however, delegated to the Attorney General, not to us, the delicate and troubling responsibility of putting content into the ambiguous phrase “probable danger of financial failure.” We cannot therefore say that his interpretation of that phrase as applied to this case, with all of its obvious policy implications, was unreasonable. The judgment of the district court therefore is

Affirmed.

¹³ We need not consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA. The Attorney General was reasonable to conclude that this record did not present such a situation.

GINSBURG, RUTH B., *Circuit Judge, dissenting*: As a condition to the consummation of a joint operating agreement (JOA), and receipt of the attendant antitrust exemption, Congress required the approval of the Attorney General, an approval intended to “act as a brake” upon premature resort to such devices. 116 CONG. REC. 2006 (1970) (statement of Sen. Hruska). In this important and unprecedented case, the Attorney General approved a JOA and, in so doing, rejected the contrary conclusions of the administrative law judge (ALJ) and the Justice Department’s Antitrust Division, as elaborated in the post-hearing brief the Division presented to the ALJ. At issue is a large and attractive newspaper market, Detroit, one concededly capable of sustaining two profitable newspapers. I have grave doubts whether the Attorney General properly performed in this instance the braking function Congress envisioned for him. I would therefore remand the case for reconsideration and a fuller account of the standard of approval the Attorney General deems applicable.

I.

As the Antitrust Division emphasized before the ALJ, no prior JOA application “has presented a comparable situation.” Post-Hearing Brief of the Antitrust Division, Docket No. 44-03-24-8 (Sept. 23, 1987) [hereafter, Antitrust Division Brief], at 2. The Detroit Free Press (a morning newspaper)-Detroit News (evening paper) application “involves the largest market and largest newspapers” in the nation “ever to be involved in a JOA.” *Id.*¹ Applicants concede that the Free Press is unlike any

¹ The Assistant Attorney General in charge of the Antitrust Division, in recommending that a hearing be held before an ALJ, stated: “Clearly, Detroit remains one of the largest and most attractive newspaper markets in the country.” Report of the Assistant Attorney General, Public File No. 44-03-24-8 (July 21, 1986) [hereafter, Assistant Attorney General Report], at 3 (executive summary); *see id.* at 27 (same observation).

other newspaper thus far declared "failing." The typical case presents an applicant caught in a "downward spiral" in which the newspaper's "declining circulation and lessening advertising feed off one another, eventually forcing it to close." *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 471 (9th Cir.), cert. denied, 464 U.S. 892 (1983). The only Newspaper Preservation Act-JOA before this one to be examined in court, *Hearst*, fit that description.

Just as there is no dispute that the Free Press and the News have both incurred significant losses on an operating basis,² so it is undisputed that neither paper has experienced any "downward spiral" effect. On the contrary, in the relevant time period, 1976 to 1986, the Free Press share of daily circulation was never less than 49%; its competitive position has remained essentially stable; the News, though retaining a "leading" edge, is not "dominant." Antitrust Division Brief at 7-11. In other words, the two papers, each now maintained by a "deep pocket," the News by Gannett, the Free Press by Knight-Ridder, have fought to a draw. Neither has achieved supremacy. The competition today "is as close, or closer, than it was a decade ago." *Id.* at 2.³

Gannett, it is also conceded, acquired the News only after obtaining expression of Knight-Ridder's willingness

² As the Majority Opinion (Maj. Op.) at 7 reports, the Free Press lost over \$10 million per year from 1981 to 1986, while the News lost over \$50 million between 1981 and 1986.

³ This portrait of the competitive situation, drawn in the Antitrust Division Brief, contrasts with the majority's depiction of the Free Press as "poised on the brink of the [downward] spiral." Maj. Op. at 13. The majority recognizes that the downward spiral is indicated "[o]nce a paper loses circulation." *Id.* at 6. In this light, the Antitrust Division emphasized the precarious position of the News: "The News has been unable to convert its leads into any degree of profitability; instead, its losses in 1986 increased as it sought to protect a daily circulation lead which it appeared to be on the verge of losing." Antitrust Division Brief at 10.

to consider a JOA. *Id.* at 27-28. The nearly equal profit split for the Free Press under the JOA indicates the "standoff" that existed; it reflects "a recognition on Gannett's part that the Free Press was not likely to exit the market in the near future." *Id.* at 20-22. No "failing" paper in Newspaper Preservation Act history, it appears, has emerged so advantageously under an approved JOA. *Id.* at 22. In these circumstances, I believe it incumbent on the Attorney General to recall—as our sister court observed—the legislature's "primary" concern "to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA." *Hearst*, 704 F.2d at 478.⁴

II.

Three "failing newspaper" standards figured in the design of the Newspaper Preservation Act: the deathbed "failing company" doctrine which Congress rejected; the "not likely to remain or become financially sound" standard Congress adopted for existing JOAs, i.e., those entered into prior to July 24, 1970; and the "probable danger of financial failure" definition Congress set for future JOAs. See 18 U.S.C. §§ 1802(5), 1803(a), (b) (1982); *Hearst*, 704 F.2d at 473-74. Under the "failing company" doctrine, as stated by the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-38 (1969), newspapers with JOAs could successfully defend against illegal merger or agreement charges only upon showing an enterprise in dire financial straits, on the brink of collapse, reaching for "the last straw." Congress thought that doctrine too exacting. It settled on a more lenient definition to grandparent existing

⁴ Cf. Assistant Attorney General Report at 6-7 (executive summary) ("When a newspaper owner consciously and deliberately decides to sacrifice short-term profits in a quest for greater long-term profits, indeed potential monopoly profits, should a JOA be available as a 'second-best' alternative?"); *id.* at 66 (same query).

JOAs and, as the Attorney General acknowledged in this case, it conceived the "probable danger of financial failure" standard for future JOAs as a "middle ground," one falling in between the other two. See Attorney General's Decision and Order, Docket No. 44-03-24-8 (Aug. 8, 1988) [hereafter, Attorney General's Decision], at 8.

The Newspaper Preservation Act's legislative history confirms that the "probable danger" standard was meant to have bite, to be "far more stringent" than the "not financially sound" test, 116 CONG. REC. 23,146 (statement of Rep. Kastenmeier), and thus "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure." *Id.* at 23,148 (statement of Rep. McCulloch). Given the congressional design, approval of a proposed JOA requires an affirmative answer to this question: "Is the [allegedly failing] newspaper suffering losses which more than likely cannot be reversed?" *Hearst*, 704 F.2d at 478.

The Attorney General's readiness to say "Yes" to a JOA for Free Press-Detroit News now, despite the view of the Antitrust Division and the ALJ that such a judgment remains premature,⁵ seems to me problematic on two counts. First, the Decision affords no assurance that the Attorney General has found a "middle ground" firmer than the pliant "not likely to . . . become financially sound" ground Congress thought inadequate for

⁵ It bears repetition that the ALJ's decision reflected the position presented to him as the decided view of the Antitrust Division, the very Department of Justice unit responsible for enforcing the antitrust laws. The bottom lines of the brief filed by the Division after the ALJ hearing state: "[T]he record does not warrant the conclusion that Detroit cannot support two competitive papers or that the Free Press is in probable danger of failure if the JOA is denied. The Antitrust Division therefore recommends that the application be disapproved." Antitrust Division Brief at 29.

new agreements. The Decision never suggests any separate content for the "probable danger" standard to distinguish it from the more accommodating one. Second, the demonstration that satisfied the Attorney General allows parties situated as Gannett and Knight-Ridder are artificially to generate and maintain the conditions that will yield them a passing JOA. I remain unpersuaded that, with passage of the Newspaper Preservation Act, Congress opened the door to this sort of self-serving, competition-quieting arrangement. *Cf.* Attorney General's Decision at 12 (maintaining that "Congress opened the door to just this sort of response with passage of the Newspaper Preservation Act").

It is accepted by the Attorney General that the Free Press and News have arrived at a "competitive stalemate," Attorney General's Decision at 5, and that market dominance is "no longer within the grasp of either paper." *Id.* at 13. It is also a "given" that "the Detroit market *could* sustain two profitable newspapers if both circulation and advertising prices were increased." *Id.* at 9 n.3 (emphasis in original). But "the unbroken pattern of annual operating losses" cannot be reversed by Free Press "unilateral actions," and that, in the Attorney General's judgment, makes "probable" if not "imminent" the "danger of financial failure." *Id.* at 7, 12.

Without the lure of a JOA, however, what reason is there to believe that the losses here "likely *cannot* be reversed"? Absent the Attorney General's promise of that large pot of gold, would the parties not have, as the Antitrust Division suggested, an effective "incentive to adopt strategies directed toward achieving profitability in a competitive marketplace"? Antitrust Division Brief at 27, 28.

The Attorney General does not disavow "the well-recognized rule that antitrust exemptions must be narrowly construed." *Hearst*, 704 F.2d at 478 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205,

231 (1979)). This accepted rule⁶ should be factored into an evaluation already weighted by (1) the concession that both newspapers, by their own projections, "could achieve profitability with price increases and the elimination of discounting," Attorney General's Decision at 5, and (2) the burden of proof which JOA applicants bear, 28 C.F.R. § 48.10(a)(4) (1988). A remand would give the Attorney General an opportunity to state more comprehensibly why the JOA-route is ripe for his approbation now, i.e., why that course should not be deferred for consideration "at some future time" when the results of the current competition afford a firmer basis for predicting whether the Free Press, profitably for itself, for readers, and for advertisers, can survive. See Antitrust Division Brief at 29.

CONCLUSION

Detroit, as the Attorney General said, "is a highly prized \$300 million dollar market." Attorney General's Decision at 4. That market could sustain two profitable newspapers. *Id.* at 9 n.3. Market dominance is now beyond the grasp of the News as well as the Free Press. *Id.* at 13. The Attorney General has not cogently explained why, on the facts thus far found, the proposed

⁶ My colleagues deem the rule one the Attorney General need not "pick" if he finds the statute ambiguous. See Maj. Op. at 15-16. At the same time, however, my colleagues recognize that the *Hearst* court's analysis was "guided by" the rule. *Id.* at 15. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), modifies *Hearst* pro tanto, the majority next maintains, and relegates the "narrow construction of antitrust exemptions" rule to cases in which Congress had a specific intent. See Maj. Op. at 15. Did *Chevron* indeed uproot a guide (both to the executive and to the judiciary) of such "fundamental importance" (*Hearst*, 704 F.2d at 473) to antitrust law administration? Under *Chevron*, is it the Attorney General's prerogative to construe an ambiguously-phrased antitrust law exemption expansively? The answer to these questions, I believe, unless and until Higher Authority tells us unambiguously otherwise, must be "No."

JOA has become "an available option." *Id.* Making the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the "frame of reference [Congress] essentially embraced"—"the scenario of a strong newspaper poised to drive from the market a weaker competitor," a newspaper experiencing, "due to external market forces," a decline in revenues and circulation "that in all probability cannot be reversed." *Id.* at 6, 13-14. I therefore dissent from the majority's disposition approving instant the giant stride the Attorney General has taken.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued: February 24, 1989

No. 88-5286

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.,
APPELLANTS

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.

Appeal from the United States District Court
for the District of Columbia

(C.A. No. 88-02322)

On Appellants' Suggestion for Rehearing *En Banc*

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

Appellants' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the suggestion is denied. It is

FURTHER ORDERED, by the court *en banc*, on its own motion, that the stay of implementation of the joint operating agreement reimposed by the order of February 2, 1989, shall remain in effect until 5:00 p.m. E.S.T. on March 6, 1989, to afford appellants an opportunity to apply to the Supreme Court for a stay beyond that date.

FOR THE COURT:
CONSTANCE L. DUPRE,
Clerk

Chief Judge WALD and *Circuit Judges* MIKVA, EDWARDS and RUTH B. GINSBURG would grant the suggestion for rehearing *en banc*.

A concurring statement of *Circuit Judge* SILBERMAN, joined by *Circuit Judge* ROBINSON, is attached.

A dissenting statement of *Chief Judge* WALD, joined by *Circuit Judges* MIKVA and EDWARDS, is attached.

Circuit Judges STARR and D. H. GINSBURG did not participate in this matter.

SILBERMAN, *Circuit Judge*, with whom ROBINSON, *Circuit Judge*, joins, concurring in the denial of rehearing *en banc*: The Chief Judge offers two justifications to slip *Chevron's* restraining leash. Neither is grounded on an actual construction of the statutory language (which she concedes is ambiguous) nor its legislative history. Instead, the Chief Judge first interposes a theoretical economic argument to challenge the reasonableness of the Attorney General's interpretation of the statute. The Attorney General's conclusion that the Detroit Free Press is in "probable danger of financial failure" is unreasonable, we are told, because it is based on an economically unreasonable prediction—that the Detroit News is willing to continue to price below its costs in order to drive the Free Press to close its doors.¹ This is unreasonable because sophisticated firms do not—over a significant period of time—cut prices in order to drive a competitor out of the market, *unless* entry barriers prevent new competitors from emerging. If new competitors could emerge, the costs incurred in driving the old competitor out of the market would be wasted. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 n.17 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

I quite agree with that proposition. But I cannot see its relevance to this case. Congress obviously would not have passed the Newspaper Preservation Act unless it had perceived entry barriers that prevented an effective challenge to a monopoly newspaper. And, although it is not up to us to question Congress' judgment, surely we have seen nothing in this case to suggest Congress was misinformed. Whether those entry barriers, as a theo-

¹ Or more accurately, the question is whether the Attorney General reasonably believed that the Detroit Free Press reasonably believes that the News will follow that course. In that event, as we said in our opinion, the Free Press' assertion that it will shut down if the JOA is denied is hardly incredible.

retical matter, are properly analyzed as due to a natural monopoly² or a variation on that classic economic theme (I am beginning to doubt that anyone truly understands the newspaper market) is beside the point. Congress authorized the Attorney General to prevent a city newspaper editorial monopoly—even at the risk of a shared economic monopoly—because it thought the unusual economics of the newspaper industry compelled that exception to the antitrust laws. Otherwise, one newspaper may achieve a stunning fusion of economic and editorial (political) power due to the loss of actual and potential competition. The Chief Judge's basic quarrel thus is with the premise of the statute itself.

Although the appellants did not present the theoretical gloss that the Chief Judge puts on their argument, they

² See C. Kaysen & D. Turner, *Antitrust Policy* 191 n.1 (1971) ("There are disturbing indications that newspaper publishing is approaching this unhappy state [of natural monopoly] in many cities and towns."). The Attorney General never took a position on whether the Detroit market is a natural monopoly, and the passage on which the Chief Judge relies obviously fails to suggest that he did. See Statement of Chief Judge Wald, at 2 n.2. The Attorney General simply said that "the *Free Press* plainly does not face external market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend almost certain failure." And his statement that "the Detroit market *could* sustain two profitable newspapers *if* both circulations and advertising prices were increased" is not really inconsistent with the possibility that the Detroit market is a natural monopoly. See P. Areeda & D. Turner, *Antitrust Law*, § 621, at 48 (In a natural monopoly market, "demand may be sufficient at *some price* fixed by law or cartel to cover the costs of more than one producer, but the cost of production will be significantly lower with a single producer."). The ALJ did say that "there is no convincing evidence that superior scale economies is [sic] likely to be determinative for the News," but it is by no means clear that it is only or chiefly scale economies that cause one-newspaper towns. That may be why the newspaper market is so puzzling.

did rely—as does the Chief Judge—on the Attorney General's statement that hypothetically Detroit could support both papers. That would be so if—and this is a big if—both papers raised their prices. The Attorney General, however, never predicted how long that hypothetical situation would last or how it might be enforced.³ There is the rub. As Congress realized, *see* S. REP. NO. 535, 91st Cong., 1st Sess. 2-4 (1969), one of the competing newspapers in any American city seems all too often to achieve a dominant position, which means that a newspaper owner who holds an advantage in a two newspaper city might be irrational if he did *not* attempt to drive his competitor out of business. Otherwise, he might wake up one day to realize that he had lost the superior position and was already himself in the downward spiral. In other words, an unregulated long-term two newspaper competitive equilibrium may well be a rarity (if not a chimera), and surely no newspaper owner in such a market can be confident that he and his competitor are in that exceptional city. *See* 116 Cong. Rec. 1788 (1970) (Statement of Sen. Fong) (“[I]t [is] increasingly difficult for many newspapers to coexist in the same community under conditions of all-out economic competition.”). Accordingly, the ALJ found that the “strategies pursued by the Free Press and News . . . were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral.” ALJ Report, at 112-13. Even if the Detroit market was an exception to the prevailing pattern, the News (and the Free Press) could not possibly know that, and therefore neither paper would rationally gamble on such an assumption.

³ The ALJ did quote the management of the Free Press as saying that the paper could become profitable if “competitive pricing becomes rational and consistent with other markets around the country.” *See* Statement of Chief Judge Wald, at 1. But, as we explained in our opinion, all the Attorney General said was that some hypothetical pricing scheme could support two papers.

I do not see, in short, how the Chief Judge's interposition of economic theory supports her contention that the Attorney General's construction of the statute or his prediction as to the Detroit News' behavior is unreasonable.

Chief Judge Wald's second contention (inconsistent with her first) assumes that it *would* be reasonable for the News to continue to price below cost in order to drive the Free Press out of business, but argues that such behavior constitutes illegal predation—or something “perilously close” to illegal predation. The difficulty with this argument, no matter how couched, is not only was it not raised by appellant in this court,⁴ it was not raised by any party—including the antitrust division—before the ALJ or the Attorney General. Indeed, the ALJ specifically noted that it was unnecessary to consider whether predation would affect his analysis of the statute, because it was not argued in this case. ALJ Report, at 122 n.303. And he observed that competition short of predation—even that designed to drive competitors out of business—was irrelevant, since the NPA “neither penalize[s] nor

⁴ Appellants merely contended (*see* Statement of Chief Judge Wald, at 6 n.7) that the Attorney General's interpretation of the NPA would allow large corporate newspaper chains to obtain JOAs by pursuing a course of aggressive competition. Only the amicus mentioned predation, and its concern was that approval of the Detroit JOA would lead to illegal pricing in *Little Rock*. Amicus asserted that the Arkansas Gazette had engaged in “unprecedented” predatory action in hopes of obtaining a JOA (which suggests that Little Rock might be an appropriate place to advance the Chief Judge's argument). The amicus filed no public comments on the Detroit JOA with the Attorney General and did not seek to intervene in that proceeding. The major Detroit-area newspaper unions and Mayor Young of Detroit did intervene before the Attorney General, *see* 28 C.F.R. § 48.11, but did not appeal. Moreover, appellants only barely (in one sentence) made the argument that Judge Ruth B. Ginsburg focused on in her dissent—that exceptions to the antitrust laws should be narrowly construed.

reward[s] firms determined to eliminate their competition." *Id.* at 122. No party specifically challenged either of those observations of the ALJ at any stage in these proceedings. It is, of course, black letter law that an argument not made before an agency cannot be the basis of a legal challenge on appeal. *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1947); *United States v. L.A. Tucker Trucklines*, 344 U.S. 33, 37 (1952); *Safir v. Kreps*, 551 F.2d 447, 452 (D.C. Cir. 1977) ("[A]ppellant is not free to raise points without regard to whether they were argued at some stage of the administrative process.").⁵

Chief Judge Wald's predation argument, moreover, implicates a good deal more than the Attorney General's approach to Joint Operating Agreements. If the Attorney General were to conclude that he would not approve a JOA if the stronger paper had engaged in below cost pricing for some period before the submission of the JOA, he would have to assume the responsibility for preventing that "predation." Otherwise, newspapers like the News would, for the reasons described above, engage in such behavior to achieve dominance in their markets without regard to a JOA. By suggesting that the News' pricing practices were "illegal predation," the Chief Judge, in other words, implicitly seeks to preempt prosecutorial decisions of the Executive Branch.

Nevertheless, the Attorney General and his Antitrust Division might ponder Chief Judge Wald's suggested approach to newspaper antitrust enforcement policy and modify their position accordingly. Or, in a future case, a party might make the argument the Chief Judge suggests. That, however, is all the more reason to deny rehearing here. If and when we are properly faced with the contentions the Chief Judge advances, we can decide their correctness. In that event, this case might not have any enduring impact.

⁵ Perhaps appellants did not raise the predation argument here because they knew it was not raised before the Attorney General.

WALD, *Chief Judge*, with whom MIKVA and EDWARDS, *Circuit Judges*, concur, *dissenting from denial of rehearing en banc*:

The split panel's approval of the Attorney General's decision to allow the Joint Operating Agreement ("JOA") between the Detroit Free Press and the Detroit News turns on the reasonableness of a single prediction: that even in the absence of a JOA or any possibility thereof, the News will continue to price below costs, sustaining significant losses itself and driving the Free Press from Detroit. See Majority Opinion at 11, 12, 19-21. Although the Newspaper Preservation Act's definition of a "failing newspaper" is ambiguous, Congress must have meant for the term to make *economic* sense; indeed it defined a failing newspaper as one "in probable danger of *financial failure*." 15 U.S.C.A. § 1802(5) (*emphasis added*). Thus *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) requires at a minimum that the Attorney General's prediction about future newspaper prices in Detroit be economically reasonable. I believe that the economic reasonableness of the Attorney General's prediction, on which the full weight of his decision to allow the JOA rests, is sufficiently dubious to warrant *en banc* treatment.

His prediction about what would happen in the absence of a JOA makes no economic sense in light of the factual findings he himself accepted as true. Crucially, the Attorney General accepted the ALJ's basic finding that Detroit, the fifth-largest newspaper market in the country, can support *two profitable newspapers* if, in the words of Free Press management, "competitive pricing becomes rational and consistent with other markets around the country," ALJ Report at 85, *i.e.*, if these two competitors do not continue to engage in deliberately unprofitable pricing strategies with the predatory objective on the part of one paper to drive the other into

failure so as to secure a JOA.¹ The Attorney General, of course, could have substituted different factual findings about the ability of the Detroit market to support two newspapers but he did not.² Thus, his conclusion that

¹ The ALJ found that the Detroit situation was not one of a "junior" newspaper valiantly trying to retain a foothold in the market, *see* Majority Opinion at 7, and that the characteristic elements pushing one paper into a "downward spiral," *see* Majority Opinion at 13-14 and 20 n.12, did not exist in Detroit. *See* In the Matter of Detroit Free Press, Recommended Decision 95-100 (Office of the Attorney General, No. 44-03-24-8, December 29, 1987) ("ALJ Report") (discussing relationship between scale economies, downward spiral and junior paper concerns); *id.* at 112-113 (finding relationship not to exist in Detroit). Judge Silberman in his concurrence in the denial of rehearing *en banc* suggests that it is sufficient that the newspapers expressed a belief in the junior newspaper problem even if there were no facts to show this was a rational belief; the full quote from the ALJ's report is: "The strategies pursued by the Free Press and News—future domination and profitability at the cost of current profits—were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral. *There is no convincing proof, however, that the economic conditions underlying this history—particularly the effects of scale economies—is applicable to these two large papers.*" ALJ Report at 112-13 (emphasis added).

The ALJ explicitly found that "[t]he objective of dominance and future profitability were pursued by both papers (and their parents) in the belief that failure too had its reward in the form of JOA approval" and that dominance was sought not by exploiting cost advantages but by cutting price below costs. Consequently, "as one might expect, Detroit cannot sustain two profitable papers when both are practically being given away." ALJ Report at 115.

² Judge Silberman in his concurrence (and in the majority opinion) appears to contest this basic factual finding. But the ALJ explicitly rejected the argument that there was evidence that Detroit is a natural monopoly. And the Attorney General stated: The Free Press "plainly does not face *external* market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend al-

only *one* newspaper has a profitable future in Detroit, depends on the assumption that below-cost pricing is *probable* for the indefinite future, *without* the prospect of a JOA. But as to this critical finding the Attorney General (*see also* Majority Opinion at 20-21) merely asserted that such pricing would not reflect "unsound business judgment" and that in response to such pricing "it would neither be counterintuitive nor contradictory" for the Free Press to shut down. Surely it cannot be enough, even under the second prong of *Chevron*, for the Attorney General just to say that, *and no more*, in view of both the ALJ's and the Antitrust Division's strong disagreement with that prediction.

Classic economic principles and basic antitrust law run counter to *any* prediction that sophisticated firms will pursue below-cost pricing strategies over the long haul. *See, e.g.,* McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289, 291-300 (1980); Bork, *The Antitrust Paradox*, 144-159 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 697-704 (1975). (Newspaper giants like Knight-Ridder and Gannett certainly qualify as sophisticated). Yet this is precisely the predicate on which the Attorney General had to build his case: that the News will, *even if the JOA is denied*, price below its costs with the deliberate and unabashed goal of stran-

most certain failure. Nor . . . do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial "downward spiral" that is fatal to survival." Attorney General's Decision and Order, No. 44-03-24-8 (August 8, 1988) at 8 (emphasis added). Moreover, Free Press management itself stated that "one of the prerequisites to returning to profitability—for both newspapers—is restoring rational pricing in the market,"; in 1983 it "projected from an economic model that under conditions of 'normalized competition' the Free Press would earn \$1.5 million per year and the News \$5 million." ALJ Report at 85-86.

gling the Free Press; and that the News will incur heavy losses far into the future (the ALJ found that it would take at least seven to ten years to eliminate the Free Press in this fashion) on the ephemeral hope of monopoly profits at the end of the line, assuming, that is, that its monopoly status goes *unchallenged* by a new or revived rival seeking to share in the spoils.³

The Supreme Court has only recently reiterated that "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (holding summary judgment appropriate where evidence insufficient to overcome theoretical economic obstacles to predatory conspiracy), and that they are "impossible to maintain" successfully in the absence of any "reason to suppose that entry into the relevant market is especially difficult," *id.* at 591 n.15; *see also Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 121 n. 17.⁴ In view

³ Economists agree that predatory pricing is undertaken only if the predator expects competitors to shut down and no new entry into the market to occur. *See, e.g., McGee, Bork Areeda & Turner, supra.* This analysis is of course crucially altered if a JOA is available, as the past behavior of these newspapers suggests. A JOA is precisely the type of guarantee that a potential monopolist needs to ensure that its rival will disappear for good. *See Matsushita, infra*, 475 U.S. at 591 n.15 and n.16 (barriers to entry can secure future profits needed to recoup losses sustained in driving competitor from market permanently). It is not at all "inconsistent" to argue that it is possible that unprofitable price-cutting will occur when a JOA protects a future monopoly but that such behavior is unlikely if such protection will be denied.

⁴ Indeed,, then Assistant Attorney General Douglas H. Ginsburg and Solicitor General Fried arguing for the government as *amicus curiae* urged the Court in *Cargill* to find predatory pricing schemes so inherently unlikely that a *per se* rule was justified "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." 479 U.S. at 121.

of this common wisdom, I believe the Attorney General's economic prediction about the fate of the warring newspapers deserves a second look by an *en banc* court. Neither the Attorney General nor the panel provides any reasons why standard economic principles are not relevant to this case.

Nor do I see how a court can ignore the fact that the economic behavior on which the Attorney General's grant of immunity rests comes perilously close if it does not actually constitute⁵ "a practice inimical to the purpose of the antitrust laws," *id.* at 118.⁶ The Newspaper Preservation Act authorizes the Attorney General to immunize from antitrust prosecution otherwise unlawful *mergers* between two newspapers. The Attorney General's decision here extends that immunity beyond merger to sustained below-cost pricing aimed at reducing a healthy two newspaper market to a monopoly press. In the view of the Attorney General himself the aim of at least one of the newspapers was to cut prices so as to eliminate a rival newspaper, enduring huge losses in the bargain, but thereafter attaining a monopoly. The notion that Congress intended the Newspaper Preservation Act to condone such a result is a sufficiently startling one to require perusal by an *en banc* court. Legislative history suggests that Congress wanted to preserve as many "re-

⁵ The ALJ observed that "predatory pricing" was "at least suggest[ed]" by the record. "To illustrate, it was a close question as to whether the Free Press or News would be designated the 'failing paper' for purposes of filing the JOA application. Finding 43. But the News's losses arose from such severe discounting that Gannett expressed concern over 'the potential problem of illegal advertising contracts entered into by the News and their advertisers during their war for ad volume.'" ALJ Report at 122-123 n.303.

⁶ Whether the Attorney General would seek to prosecute such behavior independently under the antitrust laws is a separate question, which need not be answered in construing the statute.

portorally independent and competitive" newspapers as possible, 15 U.S.C.A. § 1801 (congressional declaration of policy), but, recognizing that *some* markets in which two or more newspapers presently existed could support only one daily, sought to retain as much of the disappearing paper's voice as possible. Where, however, two independent papers can compete legally and stay alive, condoning resort by one to pricing which on the record is hard to distinguish from illegal predatory pricing, in order to secure a monopoly protected by a JOA, will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place. Whether that kind of immunity "effectuate[s] the policy and purpose" of the Act, 15 U.S.C.A. § 1803 (b), *cf.* 15 U.S.C.A. § 1803(c) (immunity not to extend to predatory acts of jointly operating newspapers), is an important enough issue to merit a full court press.⁷ For

⁷ Judge Silberman suggests that we cannot consider this consequence of the Attorney General's decision because "it was not raised by appellants." It was, however, raised by the appellants. Appellants stated in their brief that "as explained in more detail in the *amicus curiae* brief of Little Rock Newspapers, Inc., [the Attorney General's interpretation of the Act] would allow deep pocket newspaper owners to obtain a JOA almost at will . . . [A] corporation such as Gannett or Knight-Ridder that could afford short-term losses, could simply purchase a competing newspaper, and launch a price war by reducing circulation and advertising prices, which would force its competitor to do the same." Brief for Appellants at 44. As the *amicus* brief explained further in its primary argument (certainly not limited to Little Rock) that "The Newspaper Preservation Act Should Not Be Construed To Encourage Predatory Conduct:" "[t]he Attorney General's approval of the JOA . . . rewards potentially predatory conduct." "The [interpretation] convert[s] the Newspaper Preservation Act from a vehicle for preserving journalistic competition where it would otherwise not exist into a vehicle to assist in eliminating competitive newspapers even where both newspapers otherwise could survive. . . . The danger evident from the Attorney General's approval of the

these reasons, I dissent from the decision to deny rehearing *en banc*.

JOA here is that it endorses the anticompetitive tactics used." Brief for *Amicus Curiae* Little Rock Newspapers at 7; *id.* at 13. "Such a result was clearly not intended by Congress." Reply Brief of Appellants at 7 n.3. It hardly implicates case or controversy or separation of powers to point out that cutting prices to sustain current losses with the objective of eliminating a rival and securing monopoly, "predatory conduct" as it was termed by Little Rock, is presumably illegal under the antitrust laws.

No. 88-1640

3

Supreme Court, U.S.

FILED

APR 12 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION OF RESPONDENT
DETROIT FREE PRESS, INCORPORATED**

CLARK M. CLIFFORD
Counsel of Record
ROBERT A. ALTMAN
ROBERT P. REZNICK
ROBERT C. SANDERS
CLIFFORD & WARNKE
815 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 828-4200

PHILIP A. LACOVARA
HUGHES HUBBARD & REED
1201 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20004
(202) 626-6200

GERALD GOLDMAN
Of Counsel

*Counsel for Respondent
Detroit Free Press, Incorporated*

29p

RESTATEMENT OF QUESTION PRESENTED

1. Was the Attorney General, applying the settled construction of the Newspaper Preservation Act, arbitrary and capricious in concluding that the Detroit Free Press was "in probable danger of financial failure," where the paper:

- had sustained increasing operating losses totaling \$81 million between 1979 and 1986;
- would have failed long ago without cash infusions totaling \$176 million from its corporate parent;
- could pursue no unilateral business strategy that would return it to profitability;
- trailed The Detroit News significantly in advertising and circulation;
- had battled the News for leadership in Detroit for well over a decade;
- had not engaged in improper marketing practices or mismanagement; and
- would close if the joint operating arrangement with the News were denied?

RULE 28.1 STATEMENT

As required by Supreme Court Rule 28.1, Respondent Detroit Free Press, Incorporated hereby states (1) that it is a wholly-owned subsidiary of Knight-Ridder, Inc.; (2) that it has no subsidiaries other than wholly-owned subsidiaries; and (3) that its affiliates (excluding wholly-owned subsidiaries of Knight-Ridder, Inc.) are the following subsidiaries and other entities that are partially-owned by Knight-Ridder, Inc.: the Seattle Times Company; Southeast Paper Manufacturing Company; Ponderay Newsprint Company; TKR Cable Company; SCI Holdings, Inc; SCI Cable Partners; Knight-Ridder Tribune News Service; Fort Wayne Newspapers, Inc.; and Fort Wayne Newspaper Agency.

TABLE OF CONTENTS

	<u>PAGE</u>
RESTATEMENT OF QUESTION PRESENTED...	i
RULE 28.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATUTE INVOLVED.....	1
SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED	2
COUNTERSTATEMENT OF THE CASE	4
A. The Newspaper Preservation Act	4
B. Proceedings Before The Attorney General ..	7
C. Affirmance By The District Court	11
D. Affirmance By The Court of Appeals	12
REASONS WHY THE PETITION SHOULD NOT BE GRANTED	14
I. The Court Of Appeals' Decision Applied Settled Standards Of Judicial Review, And Will Not Have A Broad Impact On Anti- trust Laws That Are Enforced By Adminis- trative Agencies	14
II. This Case Does Not Present A Significant Issue Regarding Construction Of The News- paper Preservation Act	18
CONCLUSION	23

TABLE OF AUTHORITIES

	<u>PAGE</u>
CASES:	
<i>Amoco Production Co. v. Gambel</i> , 480 U.S. 531 (1987) .	17
<i>Bowen v. American Hospital Association</i> , 476 U.S. 610 (1986)	17
<i>Chevron USA, Inc., v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	5
<i>Committee For An Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), <i>cert. denied</i> , 464 U.S. 892 (1983)	<i>passim</i>
<i>Federal Maritime Commission v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973)	16
<i>Group Life & Health Insurance Co. v. Royal Drug Co.</i> , 440 U.S. 205 (1979)	17
<i>Immigration and Naturalization Service v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	17
<i>Louisiana Public Service Commission v. FCC</i> , 477 U.S. 355 (1986)	17
<i>Niagara Frontier Tariff Bureau, Inc. v. United States</i> , 826 F.2d 1186 (2d Cir. 1987)	16-17
<i>Sorenson v. Secretary of Treasury</i> , 475 U.S. 851 (1986)	17
<i>Square D. v. Niagara Frontier Tariff Bureau</i> , 476 U.S. 409 (1986)	17
<i>United States v. First National City Bank</i> , 386 U.S. 361 (1967)	17
STATUTES AND REGULATIONS:	
Bank Merger Act	
12 U.S.C. § 1828(c)(7)(A)	17
Newspaper Preservation Act	
15 U.S.C. § 1801, <i>et seq.</i>	<i>passim</i>
15 U.S.C. § 1801	19
15 U.S.C. § 1802(5)	5,6,9

	<u>PAGE</u>
15 U.S.C. § 1803(b)	5
28 C.F.R. § 48.8(c)	7
28 C.F.R. § 48.10(d)	7
28 C.F.R. § 48.14(a)	18
OTHER AUTHORITIES:	
115 Cong. Rec. 15,661 (1969)	4
116 Cong. Rec. 1786 (1970)	21
116 Cong. Rec. 1787 (1970)	5
116 Cong. Rec. 1788 (1970)	5,21
116 Cong. Rec. 1791 (1970)	5
116 Cong. Rec. 1988-89 (1970)	6
116 Cong. Rec. 2006 (1970)	6
116 Cong. Rec. 23,177-79 (1970)	6
116 Cong. Rec. 23,152-53 (1970)	5
S. Rep. No. 535, 91st Cong., 1st Sess. 3-4 (1969)	20
S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969)	4
S. Rep. No. 535, 91st Cong., 1st Sess. 6 (1969)	6
47 Fed. Reg. at 26,473	6
47 Fed. Reg. at 26,474	6,20,21
Hearing on H.R. 279 Before House Antitrust Subcom. of the Comm. on the Judiciary, 91st Cong., 1st Sess. 10-11 (1969)	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*
Respondents.

STATUTE INVOLVED

Petitioners did not include in their presentation of applicable statutes and regulations Section 1801 of the Newspaper Preservation Act, 15 U.S.C. § 1801, which reads as follows:

§ 1801. Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

This case previously came before this Court on a motion by Petitioners for a stay pending disposition of their Petition for Writ of Certiorari. The stay was denied, and now the Petition comes before the Court for determination.¹

The Petition contains the same misstatements of fact and law that marred the motion for a stay. Petitioners persist in basing their claims upon a fundamental mischaracterization of the Attorney General's decision and the opinions below. The arguments have been reordered, but still raise no questions that are genuinely presented in this case, or indeed that could be resolved on this record. What is clear is that the Petitioners' dispute with the Attorney General is a narrow, factual one, raising no legal issues significant either to the administration of the Newspaper Preservation Act ("NPA") or to the proper standards for judicial review of agency decisionmaking.

As they have done at each stage of this case, Petitioners have again changed the focus of their attack. The new centerpiece of their argument is their assertion that the Court of Appeals gave excessive deference to a construction of the NPA that Petitioners claim was impermissibly "broad." Thus, their first "Question Presented" is as follows:

Does this Court's decision in *Chevron, USA v. Natural Resources Defense Council* . . . require a reviewing court to defer to an administrative agency's *expansive* construction of an exemption from the antitrust laws, *even if the court concludes that the agency's construction is at odds with the established rule that antitrust exemptions must be narrowly construed.* (emphasis added)

1. Following this Court's denial of the motion for a stay, The Detroit News' parent, Gannett Company, has chosen to delay implementation of the joint operating arrangement until this Court has ruled on the Petition for Writ of Certiorari. Gannett has stated publicly that it remains fully committed to the JOA, and the Free Press desires that the agreement be consummated at the earliest possible date.

In fact, the Attorney General's construction of the exemption is not "expansive," and *no* court in this case has concluded that it "is at odds with the established rule that antitrust exemptions must be narrowly construed." To the contrary, both the District Court and the Court of Appeals recognized, without dissent, that the Attorney General *expressly adopted* the settled construction of the NPA—one which had been formulated with specific regard to the canon.

Petitioners' second Question Presented also criticizes a decision that bears little resemblance to the one before the Court. Petitioners ask:

In determining whether two newspapers that are competitive equals qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act *that requires only (a) a showing that papers have lost money for several years, and (b) a representation by the "non-failing" paper that it will not raise its prices even if the exemption is denied?* (Emphasis added)

The premises upon which this question is based are incorrect. In this case the Attorney General *did not* approve the joint operating arrangement ("JOA") "only" on the basis of the two factors identified by Petitioners. Completely omitted from Petitioners' characterization of the decision is the wealth of record evidence that the Attorney General relied upon, much of it undisputed, demonstrating that the Free Press was in an intractable and worsening financial crisis and, indeed, would close absent a JOA.

Petitioners disagree with these conclusions, and, in an expansive but notably misleading and incomplete factual argument, invite the Court to reweigh the evidence and agree with them that the Free Press might survive without a JOA. The question in this case, however, is whether the Attorney General's conclusions were adequately supported on the record. Both the District Court and the Court of Appeals addressed this question at great

length and answered it in the affirmative, and no reason in law or policy exists to conduct that inquiry again.

In this case, the Attorney General approved a joint operating arrangement that he concluded, on the basis of substantial record evidence, was necessary to save the Free Press, and preserve editorial diversity for the people of Detroit. The Newspaper Preservation Act was passed precisely to serve such an end. Petitioners may have a profound distaste for the statute, and may disagree with Congress as to the harsh and unique economic realities of the newspaper industry. However, these complaints should be addressed to the Congress, and not to this Court. The Petition for Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

A. The Newspaper Preservation Act

Between 1920 and 1968, the number of American cities supporting two daily newspapers declined from 552 to 45, adding more than 500 American cities to the list of those having a newspaper monopoly. See 115 Cong. Rec. 15,661 (1969) (Sen. Inouye). This trend has continued. Since the statute was passed, second newspapers in Philadelphia, Cleveland, Baltimore, St. Louis, Buffalo, and Washington have closed—the *Washington Star*, for example, despite significant financial assistance from its corporate parent, Time, Inc.

Concerned by the pattern of financial failures of metropolitan newspapers, and convinced of the vital importance of news and editorial diversity to the free and open debate of public affairs, Congress undertook twenty years ago to study the problem and its possible solutions. What Congress found was a newspaper industry where “unique economic forces operate,”² making “it more likely for newspapers to fail when faced with competition than other businesses.”³ The cause of this instability was not a mystery. In the newspaper industry, critical advertising revenue

2. *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d 467, 480 (9th Cir.), cert. denied, 464 U.S. 892 (1983).

3. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969).

depends upon circulation, which in turn depends upon advertising (as well as editorial) content. Newspapers are thus ordinarily impelled to compete vigorously for circulation and advertising market share, even if that means having to subsidize unprofitable operations.⁴ In 1970 Congress passed the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.*, to save endangered newspapers from such ruinous competition, and thereby to preserve editorial diversity in the communities that they serve.

The NPA empowers the Attorney General to authorize newspapers in a given market to enter into a JOA—an agreement which permits competing papers to combine their circulation, advertising, and production functions so long as their reporting and editorial functions remain separate and independent. More particularly, the Attorney General is given sole discretion to approve a JOA upon finding that at least one of the two newspapers party to the agreement is a “failing newspaper”—that is, a newspaper “in probable danger of financial failure”—and that approval “would effectuate the policy and purpose” of the Act. 15 U.S.C. §§ 1802(5), 1803(b).

In passing the NPA, Congress intended a “total rejection” of the rule of *Citizen Publishing v. United States*, 394 U.S. 131 (1969), under which JOAs were only lawful if one of the newspapers qualified as a “failing company”—one demonstrably on the

4. The legislative history expressly contemplates that the ruinous effects of competition between newspapers might require “massive and continuing infusion of capital” to forestall a junior paper’s demise. 116 Cong. Rec. 1788 (1970) (statement of Senator Bennett, quoting publisher of the Honolulu Advertiser); *id.* 1787 (“price war conditions, promotional activities and premiums used as a means to maintain circulation or advertising, demonstrating inherent instability,” are hallmarks of a failing newspaper) (Sen. Bennett); *id.* 1791 (statement of publisher detailing how circulation of newspaper was improved “only by engaging in heavy promotion expenditures and reducing advertising rates to get volume to attract readers,” resulting in operating losses); *id.* 23,152-53 (when faced with severe financial difficulties publishers have been forced to “subsidize[] their newspapers” to avoid closure) (Rep. Matsunaga). *Accord*, Hearing before the House Antitrust Subcom. of the Comm. on the Judiciary on H.R. 279, 91st Cong., 1st Sess. at 10-11 (1969) (Rep. Matsunaga).

brink of financial collapse.⁵ See *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-74, 476 (9th Cir.), cert. denied, 464 U.S. 892 (1983) ("*Hearst*"). Congress deliberately chose to allow "newspapers to enter joint agreements before they reached th[at] point of distress." *Id.* at 474. Otherwise, with competition from the ailing paper doomed, there would be no incentive for the leading paper to agree to a JOA. See *id.* at 479 n.10.

Under the NPA, by contrast, the standard for determining whether a JOA applicant is a "failing newspaper" is whether the paper is suffering "losses which more than likely cannot be reversed." *Hearst*, 704 F.2d at 476. In making this determination, the Attorney General must assess the financial condition of the paper "regardless of its ownership or affiliations," 15 U.S.C. § 1802(5)—that is, to quote the Ninth Circuit, the "ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent." *Hearst*, 704 F.2d at 480.⁶

The statute focuses on whether the newspaper is in "probable" danger of financial failure, and thus requires the Attorney General to exercise discretion in predicting likely competitive conditions and conduct. 15 U.S.C. § 1802(5). As Attorney General Smith ruled in the Seattle JOA decision sustained in *Hearst*, the "'danger of financial failure' must be assessed as a matter of probabilities, not certainties," and must be resolved on a "case-by-case" basis as new applications are filed. *Seattle A.G. Order*, 47 Fed. Reg. at 26,473-74.

5. Petitioners attempt (at 18) to minimize the significance of the *Citizen Publishing* requirement by saying merely that the NPA resolved "uncertainty" in application of the rule of that case to then-existing JOAs. In fact, the statute unambiguously repudiated the requirement that newspapers be "failing companies" for all JOAs, present and future. S. Rep. No. 535, 91st Cong., 1st Sess. 6 (1969).

6. Congress expressly rejected an amendment that would have eliminated the "regardless of ownership or affiliations" language and thus have permitted consideration of the financial condition of or support provided by the corporate parent. See 116 Cong. Rec. 23,177-79 (1970); 116 Cong. Rec. 1988-89 (Sen. Fong) and 2006 (Sen. Hruska) (1970).

B. Proceedings Before The Attorney General

The record before the Attorney General revealed that the Detroit Free Press had suffered massive and accelerating losses for most of the 1980's, and saw no prospect of returning to profitability. Detroit was a two-newspaper city, but could not long remain so. The Free Press had not made a profit in seven years, and its losses were dramatically escalating. Faced with an intractable financial dilemma, and kept alive only through a life support system of regular cash infusions totaling \$176 million from 1976 through 1986 from its corporate parent, Knight-Ridder, Inc., the Free Press succeeded in negotiating a JOA with The Detroit News. The Free Press saw the JOA as the only way to remain in publication, and save a substantial majority of the more than 2,100 jobs that would be lost if the paper closed. On April 11, 1986, the two papers executed the JOA, App. 31a,⁷ and submitted to the Attorney General an application for approval on May 9, 1986.

Exercising his discretion to do so (the NPA has no hearing requirement), the Attorney General referred the application to an administrative law judge ("ALJ") for preliminary fact finding and a "recommendation" as to disposition. See 28 C.F.R. §§ 48.8(c), 48.10(d). Both papers participated in administrative hearings as, by regulation, did the Antitrust Division. Six labor unions (representing more than 85% of Free Press employees) intervened in the proceeding, all of which ultimately supported approval of the JOA after concluding that in its absence

7. "App." refers to the Appendix filed by Petitioners with their Petition For a Writ of Certiorari.

the Free Press would close.⁸ JA 542-550.⁹ The Mayor of the City of Detroit similarly intervened, and similarly advised ultimately that he did not oppose the JOA. See JA 540-553. On December 29, 1987, the ALJ recommended that the application not be granted. Although the ALJ recognized that the Free Press could not through its own action restore itself to profitability, he speculated that in the absence of a JOA the News might spontaneously give up its long-standing fight for market leadership and raise its prices, thereby permitting the Free Press to follow suit. Recommended Decision of ALJ, App. 92a.

On August 8, 1988, in a careful fifteen-page review of the record evidence and applicable law, the Attorney General ordered that the JOA be approved. Expressly following the Ninth Circuit's interpretation of the NPA in the *Hearst* case, he concluded that the Free Press is "suffering losses which more than likely cannot be reversed," and thus qualifies as "failing newspaper" within the meaning of the NPA. App. 141a-42a. This conclusion was based upon a thorough review of the record and the critical recommended factual findings of the ALJ that the Free Press:

- (i) had lost over \$81 million from 1980 through 1986;
- (ii) suffers substantial competitive disadvantages in advertising and circulation in comparison to the News;¹⁰

8. The Free Press takes exception to Petitioners' unsubstantiated suggestion (at 8 n.3) that the labor unions misrepresented the basis for their support of the JOA to the Attorney General. All payments negotiated with the unions were severance and other ordinary course payments that typically would take place in the event of a reduction in work force. As stated in their filings with the Attorney General, the representatives of labor in this case recognized that a JOA in Detroit was necessary to preserve as many of their members' jobs as possible.

9. "JA" refers to the Joint Appendix filed by the parties in the Court of Appeals, a copy of which has been lodged with this Court by Petitioners.

10. Petitioners' suggestion that the Free Press and the News were "competitive equals" misstates the record. The News is the exclusive afternoon daily in Detroit, and has made significant inroads into the morning field. See ALJ 18, App. at 16a-17a. The News enjoys a particularly substantial advantage (a) in daily circulation in the primary market area (the area of greatest importance to

- (iii) is unable through any unilateral action to restore itself to profitability;
- (iv) has not brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement;
- (v) had engaged in a fierce competitive struggle with the News since at least as early as 1973; and
- (vi) would have failed long ago had it not been for cash infusions of \$176 million by Knight-Ridder.

App. 76a-77a; 120a; 93a, 100a, 122a; 19a, 120a, 121a, 128a; 15a-16a; 81a-82a.

The Attorney General also specifically considered whether, despite these facts, the Free Press might continue to operate at a loss in the hope that the News might some day raise its prices and thus afford the Free Press flexibility to increase its prices, too. The Attorney General rejected this speculation because the News "has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with" the Free Press—a strategy that "hardly reflects unsound business judgment" in light of the News' competitive ability to outlast the Free Press. App. 143a-44a. Furthermore, the Attorney General recognized that the same market forces that make it unduly risky for the Free Press to initiate a price increase apply as well to the News. As the Attorney General quoted the ALJ, "[s]ince neither the *Free Press* nor the *News* can raise circulation or

each paper's advertisers) and (b) in all aspects of Sunday circulation. See ALJ, App. 43a-45a, 48a, 49a, 52a-53a. The importance of these circulation advantages is reflected in substantial News leads in virtually every advertising lineage and revenue index. See ALJ, App. 61a-69a.

The JOA does provide for an equal split of profits after a period of preference for the News' owner. The Free Press is not without competitive strength; otherwise the News would not have agreed to enter into a JOA. The precise division of profits, however, reflects the relative staying power of the two papers' parent companies, and the fact that the News had no way of knowing how long Knight-Ridder might continue to maintain the cash life support system on which the Free Press depends for survival. See JA 232, 343-44, 349-350. In any event, these factors are irrelevant under the statute because the "failing newspaper" requirement is to be analyzed "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).

advertising prices without regard to what the other paper does, there is no completely unilateral course of action which *either paper* can pursue which would return it to profitability.” App. 140a (emphasis added).

The Attorney General also considered whether the Free Press had engaged in an improper management practice by competing for so-called “market dominance” or “domination” (that is, majority circulation and advertising market shares) with the expectation that losses incurred in the course of that competition might some day justify a JOA. Again referring to the ALJ’s recommended factual findings, the Attorney General determined that both papers had engaged in a vigorous contest of great duration in the good faith belief that market domination was required for survival and future profitability.¹¹ On that basis, the Attorney General rejected the notion that the Free Press “was principally pursuing any end other than market domination.” App. 146a. Furthermore, he refused to fault the paper for seeking a JOA, since that was nothing more than “considering and acting upon an alternative that Congress ha[d] created” in enacting the NPA. *Id.*

Taking all the facts together, the Attorney General concluded that the Free Press’ inability to reverse its operating losses “is not just speculative, or likely, but ‘probable.’” *Id.* 144a. In fact, based upon his analysis of competitive conditions in Detroit, he concluded, consistent with direct testimony from the Chairman of the Board of Knight-Ridder,¹² that without approval of the JOA it was “near certain” that the Free Press would close. *Id.* 146a.

11. See ALJ, App. 19a: Free Press and News “management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many junior papers which had not been able to survive as the second paper in metropolitan area competition.” The ALJ specifically recommended that the Attorney General consider this business strategy “neutral” under the NPA, “neither penalizing nor rewarding” the papers for it. *Id.*, App. 128a.

12. The Attorney General did not give “undue weight” to this testimony. AG, App. 144a. Nevertheless, Petitioners quote the ALJ’s demeaning characterization of the testimony as a “witness stand bolt out of the blue.” Petition at 8. In fact, the testimony echoed other record evidence that Knight-Ridder specifically contemplated closure of the Free Press on separate occasions in 1982

C. Affirmance By The District Court

Less than 48 hours before the JOA was to become effective, Public Citizen Litigation Group, representing a hastily assembled organization of about 20 individuals who opposed the JOA, filed a complaint in U.S. District Court challenging the Attorney General’s decision. None of the plaintiffs had participated in the hearings before the ALJ. A thirty-day stay was entered to permit full briefing of the case.

On September 14, 1988, after briefing and oral argument, District Judge George H. Revercomb upheld the Attorney General’s decision on expedited cross-motions for summary judgment. Judge Revercomb found that the Attorney General’s approval of the JOA was neither arbitrary nor capricious, and was well within the authority specifically conferred on the Attorney General by the NPA to effectuate the statute’s “purpose and policy.” See App. 160a. Judge Revercomb held each of Petitioners’ points to be without merit, finding, among others things, that there was ample evidence to support the conclusion that the Free Press was a “failing newspaper” given the paper’s huge losses, inability to pursue any unilateral business strategy that could return it to profitability, and the likelihood that the paper already would have ceased publication had it not been for the “massive infusions of funds” from its corporate parent. App. 156a.

In this connection Judge Revercomb addressed at length and rejected Petitioners’ assertion that the Attorney General was required to presume that the News would raise prices if a JOA were denied. Among other things, to quote Judge Revercomb, “the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon, considering that such a move would put at risk its narrow circulation advantage, which in turn could jeopardize its position as the financially healthier Detroit daily, and considering that the

and 1985. See JA 230, 348-49; Hearing Exhibit AX 514 of the Antitrust Division; Hearing Transcript at 1872-74.

management of the News has stated that it has no intention of raising prices." App. 157a.

D. Affirmance by the Court of Appeals

After expedited but extensive briefing and oral argument, the Court of Appeals affirmed the District Court's decision on January 27, 1989. Circuit Judge Laurence H. Silberman, joined by Circuit Judge Spottswood W. Robinson, III, concluded that the Attorney General's construction of the NPA—which it found mirrored that of the Ninth Circuit in *Hearst*—was a reasonable statutory interpretation. App. 168a. The court similarly found reasonable the Attorney General's application of that legal standard to the facts. *Id.* Among other things, Judges Silberman and Robinson found ample support for the Attorney General's conclusions that in the absence of a JOA the News would not likely raise prices, and that the Free Press would close. *Id.* 184a-86a.

In addition, the Court of Appeals rejected Petitioners' argument that the newspapers were guilty of disqualifying management practices by pursuing a price war in order to generate losses justifying a JOA. To quote the Court of Appeals, "the record of years of fierce competitive and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA." *Id.* 189a.¹³

Circuit Judge Ruth Bader Ginsburg dissented, recommending not an outright reversal of the Attorney General's decision but that the case be remanded for further explanation. App. 191a.

13. The ALJ observed that "the opening salvo of the latest and most bitter phase of the great Detroit newspaper war" commenced in 1973, App. 16a, and that the Free Press' goal of seeking market dominance was firmly in place no later than 1979, App. 15a-19a, 76a-77a. Nevertheless, Petitioners state that the Free Press' struggle for market leadership began "subsequent[]" to a 1981 meeting at which the possibility of a JOA was discussed with the then-owners of the News. Petition at 7. Their suggestion that the Free Press' business strategy was devised as a means of obtaining losses to support a JOA with the News is thus incorrect. Indeed, the News was sold in 1986, with its former owners *never* having agreed to a JOA.

In a footnote reference, Judge Ginsburg questioned dictum in the majority opinion regarding the proper treatment of canons of statutory construction under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* 196a n.6. Contrary to Petitioners, however, Judge Ginsburg correctly recognized that issue was not dispositive in this case. She did not dispute that the Attorney General, in fact, applied the canon in question through his application of the *Hearst* standard. *Id.* 195a-96a.

The D.C. Circuit declined to rehear the case *en banc*. No judge adopted the views expressed in Judge Ginsburg's dissenting opinion. Instead, Chief Judge Wald, joined by Judges Abner J. Mikva and Harry T. Edwards (Judge Ginsburg did not join), questioned the Attorney General's conclusion that the News was unlikely to raise prices in the event a JOA was denied. *See id.* 205a-08a. Her opinion was based upon an argument that unlawful predatory conduct must have occurred for the papers to be in their present financial state (a presumption unsupported by a finding of the Attorney General or a recommended finding of the ALJ, and not advanced by Petitioners here). She also argued that the News was unlikely to continue its market share strategy because "standard economic principles" make continued below-cost pricing improbable. *Id.* 209a.

Judge Silberman, again joined by Judge Robinson, responded to Chief Judge Wald's arguments in a concurrence to the Circuit's denial of rehearing *en banc*. First, the panel observed that Congress had passed the NPA precisely because "standard economic principles" do not apply in the newspaper industry. *See id.* 201a. Indeed, Congress fully recognized the instability of two-newspaper markets, and the rationality of pricing (like that of both the News and Free Press) that is designed to prevent the potentially devastating and permanent loss of market share. Judges Silberman and Robinson also noted, among other things, that the allegation of predatory pricing was simply not part of the case. "[I]n a future case, a party might make the argument the

Chief Judge suggests," but that was "all the more reason to deny rehearing here." *Id.* 204a.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. The Court Of Appeals' Decision Applied Settled Standards Of Judicial Review, And Will Not Have A Broad Impact On Antitrust Laws That Are Enforced By Administrative Agencies.

Petitioners' leading argument now is that the Attorney General, in conflict with the Ninth Circuit's decision in the *Hearst* case, failed to take into account the canon of construction that exemptions to the antitrust laws are to be narrowly construed, and that the Court of Appeals felt helpless under this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to correct his error. The claim that the Attorney General failed to take the canon into account misrepresents the Attorney General's ruling. And the suggestion that the Court of Appeals would have reversed had it thought itself free under *Chevron* to hold the Attorney General to application of the canon misrepresents the decision on review. Petitioners' argument, devoid of factual and legal support, does not warrant further review by this Court.¹⁴

There is no conceivable conflict between this case and *Hearst* because the Attorney General, in applying the NPA to the facts of this case, expressly followed the *Hearst* test. And there can be no conflict between the standard applied by the Attorney General and the canon of construction on which Petitioners rely—that

14. No judge who has reviewed this case has suggested that the Attorney General's application of *Chevron* causes his decision to conflict with *Hearst*. Judge Ginsburg, citing *Hearst* in her dissenting opinion, adverted to no such claimed conflict, and specifically noted that "[t]he Attorney General does not disavow 'the well-recognized rule that antitrust exemptions must be narrowly construed.'" App. 195a. And Chief Judge Wald's dissent from the denial of rehearing *en banc* does not rely on any such alleged conflict with *Hearst*; indeed, it does not even cite that case.

"exemptions to the antitrust laws are to be narrowly construed"—because the Ninth Circuit's test in the *Hearst* case was formulated with express regard for that canon, 704 F.2d at 473. See also *id.* at 477-78. Thus, in adopting the *Hearst* test—"Is the newspaper suffering losses which more than likely cannot be reversed?" (App. 142a), quoting 704 F.2d at 478—the Attorney General adopted a standard that comports in all particulars with every requirement of law.¹⁵

Thus, there is no *Chevron* issue in this case. The Court of Appeals did not consider the Attorney General's decision to represent "a significant departure from past interpretations of the NPA," Petition at 14, and did not affirm that interpretation through allegedly excessive deference. To the contrary, the Court of Appeals expressly recognized that the Attorney General's construction of the NPA paralleled that in *Hearst*, adding that the standard applied by the Attorney General, one embraced by a sister circuit as the statute's "commonsense construction," would only be overturned for "cogent reasons." App. 179a. The District Court reached a similar conclusion. See App. 156a.

There also is no support for Petitioners' implied contention that any interpretation of the NPA that permits approval of the JOA here must be a "broad" one. The facts are otherwise. Saving the Free Press in the circumstances presented in Detroit, as the Attorney General concluded, would implement the central mission of the NPA. See App. 146a-47a. Petitioners claim (at 18) that the Attorney General's decision "emasculates" the Act. But it is Petitioners who would ignore the purpose of the NPA. As the Ninth Circuit cautioned in *Hearst*: "Simply put, we will not emasculate the Act in the guise of narrowly construing it." 704 F.2d at 483.

15. It may be worth noting that the Ninth Circuit in *Hearst* arrived at its construction of the NPA taking into account both the less rigorous statutory test for pre-enactment JOAs (which does not apply here), as well as the Bank Merger Act. See 704 F.2d at 474, 476-77. Petitioners, therefore, err in suggesting (at 18-19) that the Attorney General's decision disregarded those authorities as well. See also App. 142a.

Similarly, Petitioners err in asserting that *dictum* by the Court of Appeals concerning the treatment of canons of construction under *Chevron* misstates the law. The Court of Appeals concluded that *Chevron* "precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes," unless "an accepted canon" demonstrates "that Congress had a *specific* intent on the issue in question." App. 180a. (Emphasis in original). This is precisely the limited use of canons of construction authorized by *Chevron* for the review of agency decisions. As this Court stated in *Chevron*, 467 U.S. at 843 n.9, "If a court, employing traditional tools of statutory construction, ascertains that the Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Here, the Court of Appeals concluded, there was no such specific intent. In fact, Congress had expressly conferred upon the Attorney General discretion to interpret the purposes of the NPA and make decisions that best effectuate those purposes. See 15 U.S.C. § 1803(b).

None of the cases cited by Petitioners suggests that the Court of Appeals departed from settled law. Petitioners characterize their lead case on this question, *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), as one in which Congress' intent could not be discerned, and an agency's statutory interpretation was rejected upon application of a canon of construction. See Petition at 15. But this Court in *Chevron* concluded otherwise, characterizing *Seatrain* as a case where an administrative construction was contrary to "clear congressional intent" discernible through application of "traditional tools of statutory construction." 467 U.S. at 843 n.9. Accord, *Niagra Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186,

1190-91 (2d Cir. 1987).¹⁶ The Court of Appeals' decision specifically adopts this reasoning—indeed, repeats it almost verbatim—and thus cannot possibly be seen to be in conflict with the Court's precedents.

Finally, Petitioners for the first time suggest that the panel's decision conflicts with this Court's statement in *United States v. First City National Bank*, 386 U.S. 361, 367 (1967), (interpreting the Bank Merger Act of 1966), that "in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." *Id.* at 367. This untimely argument has no merit. The "simple reason" cited by the Court in *First City National Bank* is not applicable here; this is not even an antitrust suit, let alone one involving a regulated industry. Indeed, the Attorney General's decision does not address any antitrust-related issues whose final resolution the federal judiciary has traditionally maintained are within its province. *Id.* at 369.¹⁷ If Petitioners are contending that decisions of the Attorney General under the NPA are entitled to no real deference at all, they are taking a position in conflict with *Hearst*, 704 F.2d at 471-73, and making a frontal assault on *Chevron* that cannot at this late stage be condoned.

16. The other two cases cited by Petitioners (at 14) for the proposition that exemptions to antitrust laws are to be strictly construed did not involve a court's review of agency action and are irrelevant to the question at issue. See *Square D. Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). The cases cited by Petitioners concerning other canons of statutory construction (at 17) involve situations in which canons either proved irrelevant to the case, see *Amoco Production Co. v. Gambel*, 480 U.S. 531, 555 (1987); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), or were applied to demonstrate that Congress indeed had an intent on the issue in dispute, see *Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 644 n.33 (1986); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369-70 (1986); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986).

17. Significantly, the Bank Merger Act also specifies that the court in an antitrust action under the statute "shall review *de novo* the issues presented." 12 U.S.C. § 1828(c)(7)(A). No comparable provision exists under the NPA.

II. This Case Does Not Present A Significant Issue Regarding Construction Of The Newspaper Preservation Act.

Secondarily, Petitioners claim that the Attorney General's decision establishes a right to a JOA merely where one paper has sustained losses for "several" years and where officials of the other paper are "willing" to testify that they will not raise prices if the JOA is denied. *See* Question Presented No. 2; Petition at 20. The decision, Petitioners contend, is thus a "roadmap" that "any organization" with "adequate" resources could follow to obtain a JOA, threatening the "independence" of second newspapers in 25 cities. Petition at 13, 20.

Petitioners' apocalyptic interpretation of the Attorney General's decision is indefensible. That decision does not, even implicitly, establish a two-factor test to be applied for all, or even any, future JOA applications. To the contrary, the Attorney General expressly engaged in a fact-specific evaluation of the long competitive battle between the Free Press and the News, and, following a thorough review of the record, reached a sound conclusion as to the likely outcome of that competition absent a JOA.¹⁸

The Attorney General's conclusion was based not upon the two trivialized factors recited by Petitioners, but upon a wealth of record evidence, including: years of vigorous competition between the Free Press and the News for leadership in Detroit, seven years of increasing losses suffered by the Free Press, the undisputed absence of any unilateral business strategy that could return the Free Press to profitability, \$176 million spent by Knight-Ridder

18. Petitioners try to make much of the Attorney General's adoption of the ALJ's fact findings, as if that made his contrary evaluation of those facts somehow incomprehensible. There is no difficulty, however, with the Attorney General accepting the ALJ's fact findings, but stating simply that he differed with the ALJ's "ultimate conclusion as to where those facts lead." App. 147a. And, significantly, as the Court of Appeals observed, the Attorney General's difference with the ALJ is "clear throughout the opinion." App. 189a. Of course, it is the Attorney General's conclusions that are on review, not the ALJ's, whose predictions the Attorney General was free under the NPA to accept or reject as he saw fit. *See* 28 C.F.R. § 48.14(a); App. 184a (Decision of the Court of Appeals).

to keep the Free Press in the battle—without which the paper would have closed long ago—and the inability of the Free Press or the News to raise prices without risking catastrophic loss of market share. These facts clearly demonstrate that the Free Press is a failing newspaper whose preservation through approval of a JOA will serve the NPA's purpose "of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. If this is a "roadmap" for approval of a JOA under a statute specifically enacted to protect endangered newspapers from extinction, so be it.

On this record there is no basis for Petitioners' argument that approval of the Detroit JOA will permit a "deep pocket" company to incite a price war in order to force its competitor into a JOA.¹⁹ Such conduct would find no precedent in the facts of this case. Although Petitioners persist in suggesting that the Free Press' losses were artificially created, making approval of the JOA improper, *see, e.g.*, Petition at 7, 20-22, ultimately they concede that the losses suffered by the Free Press were the product of "vigorous competition." Petition at 12. Nor did the ALJ recommend disapproval of the JOA because of any alleged improper motive in the conduct of the two papers. Indeed, he acknowledged that, given the well-known demise of junior papers across the country, the managements of the Free Press and the News "believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies." App. 19a. The Attorney General similarly concluded that the principal motivation of the parties was legitimate competition, as did the District Court and the Court of Appeals. *See* App. 145a-46a; 160a-61a; 190a n.13. *See also* n. 13, *supra*.

19. Petitioners repeat in passing their allegation that the Attorney General's decision may condone or encourage predatory pricing. Petition at 20 n.6. Of course, there has been no finding of predatory conduct by either party in this case. And the competitive battle in Little Rock, which Petitioners mention in a footnote, reveals no such conduct on the part of the News' parent, Gannett, as is discussed more fully in Gannett's filing in the Court of Appeals, which appeared as Exhibit D to the Free Press' Opposition to Petitioners' Motion For A Stay.

Moreover, the conduct feared by Petitioners would find no safe harbor under the decision below. That decision expressly excludes from its scope the very hypothetical posed by Petitioners, for the good and sufficient reason that it was not presented by the facts. As the Court of Appeals put it: "We need not consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA. The Attorney General was reasonable to conclude that this record did not present such a situation." App. 190a n.13.

Indeed, this Court should accept Petitioner's incantation of dire consequences for the NPA from the decision below with great skepticism. The statute has worked well as applied by attorneys general for almost twenty years. It has been infrequently invoked; the Detroit JOA was only the fifth to have been sought. And it has been litigated even less frequently; this is only the second case challenging approval of a JOA to have reached a court of appeals. Moreover, every decision by the Attorney General under the statute by its nature is limited to its facts. As Attorney General Smith observed in the Seattle JOA decision affirmed in *Hearst*, each JOA application must be evaluated on a "case-by-case" basis. See 47 Fed. Reg. 26,474. That is an independent exercise of judgment that neither this case nor any other can predetermine.

What more, then, would Petitioners have had the Attorney General require before approving a JOA? At times they appear to argue that the "failing newspaper" must actually to be in a "downward spiral." See Petition at 21. But this reading of the statute understandably has been specifically disavowed by Petitioners, App. 179a n.7, and is not presented as an issue for this Court's resolution. There is no requirement of a "downward spiral" to be found in the statute's language, legislative history,²⁰ or judicial construction, see *Hearst*, 704 F.2d at 478.

20. The legislative history confirms that the goal of Congress was to protect generally "newspapers in competitive difficulty." S. Rep. No. 535, 91st Cong., 2d Sess. 3-4 (1969). Indeed, there is no reference in the final Senate or House Report to "downward spiral." The sponsors of the legislation specifically intended the "failing newspaper" test to look to all the circumstances of each

For all their posturing as to the dire consequences of the Attorney General's decision, Petitioners' disagreement with it reduces to a narrow factual dispute: whether the Attorney General was arbitrary and capricious in concluding that, if the JOA were denied, the News would raise prices. Petition at 10, 20, 22.

Contrary to the conclusion of the District Court and the Court of Appeals, Petitioners seem to assert that the Attorney General was *required* to presume that absent a JOA the News would soon raise prices and thereby enable the Free Press to remain in business by following suit. See, e.g., Petition at 20, 22. This goes far beyond even the ALJ's speculation that, absent a JOA, the News "may eventually" raise prices. App. 92a; 132a. Petitioners rely upon the theory that the Detroit market might support two daily newspapers at some hypothetical level of pricing. But the possibility that two newspapers, in the absence of competition, could fix prices at such a level that both might remain profitable is clearly beside the point, as both the Attorney General and the Court of Appeals recognized. See App. 143a; 188a. As the Attorney General stated, no such actions could be achieved by the Free Press without "entirely improper collusion or collaboration with the News." App. 145a.

Petitioners also rely upon Chief Judge Wald's view that "standard economic principles" dictate that two newspapers would price as to permit both to survive. See Petition at 22; App. 209a. However, "standard" economic principles describing how businesses in typical industries might be expected to compete have no application here. Indeed, the very failure of such principles to operate in the newspaper business is what prompted passage of the NPA itself, and what explains why there have been so many

individual case and not to turn on the "downward spiral" or any predetermined bright-line test. See 116 Cong. Rec. 1786 (1970) ("factors . . . to be considered . . . in determining whether a newspaper is failing would vary with the particular circumstances of the newspapers involved") (Sen. Bennett); *id.* 1788 (similar) (Sen. Fong). Thus, in the Seattle JOA case, Attorney General Smith emphasized that Congress left "the determination whether a newspaper is 'failing' to be made case-by-case, based upon a weighing of all relevant factors and without application of particular *per se* rules." 47 Fed. Reg. at 26,474.

newspaper failures in once competitive metropolitan markets. See pp. 4-5, *supra*.

As the ALJ, the Attorney General, the District Court, and the Court of Appeals all recognized, neither the Free Press nor the News could raise prices unilaterally without risking competitive disaster. App. 93a, 100a, 122a; 143a, 145a; 156a; 185a. For the News to take such a risk if the JOA were denied, with victory in its battle with the Free Press at last in hand, would make no sense. Direct testimony from executives of both companies supported this conclusion. None supported the contrary assertion that Petitioners say the Attorney General was required to accept. Adoption of Petitioners' economic theories would thus fly in the face of the history of newspaper competition in the United States and, to quote the Court of Appeals, "the premise of the statute itself." App. 201a.

In sum, the intractable financial dilemma faced by the Free Press was not manufactured. It developed literally over decades, and despite the best efforts of the Free Press and Knight-Ridder to improve the paper and make it more attractive to readers. The Free Press pursued what it reasonably believed was the only strategy that could ensure its survival, consistent with the economic views of the industry embedded in the NPA itself. The Court of Appeals' decision stands for no more than the fact that the Attorney General reasonably believed that in these circumstances approval of a JOA was indeed consistent with Congress' goals.

* * *

The basic facts in this case are simply stated: if the JOA is approved, the Free Press and the News will merge their advertising, production, and distribution functions, with substantial economies resulting, and will operate at a profit, thereby enabling both papers to continue to provide the public separate editorial and reportorial services and opposing philosophies and ideologies. On the other hand, if the JOA is denied, the Free Press will close as a consequence of fierce competition and financial failure, and the News will have a total and complete monopoly.

In these circumstances, approval of the JOA was an unassailably correct decision and, as both the District Court and the Court of Appeals confirmed, one that was soundly based on the facts and in complete harmony with the purposes of Congress.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CLARK M. CLIFFORD
Counsel of Record
ROBERT A. ALTMAN
ROBERT P. REZNICK
ROBERT C. SANDERS
CLIFFORD & WARNKE
815 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 828-4200

PHILIP A. LACOVARA
HUGHES HUBBARD & REED
1201 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20004
(202) 626-6200

GERALD GOLDMAN
Of Counsel
Counsel for Respondent
Detroit Free Press, Incorporated

No. 88-1640

4

Supreme Court, U.S.

FILED

APR 12 1988

JOSEPH F. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.,
Petitioners,

v.

RICHARD THORNBURGH,
United States Attorney General, et al.,
Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF RESPONDENT
THE DETROIT NEWS, INC. IN OPPOSITION**

LAWRENCE J. ALDRICH
GANNETT Co., Inc.
P.O. Box 7858
Washington, D.C. 20044
(703) 284-6000

JOHN STUART SMITH
Counsel of Record
GORDON L. LANG
CORRINE M. YU
NIXON, HARGRAVE, DEVANS
& DOYLE
One Thomas Circle, N.W.
Suite 800
Washington, D.C. 20005
(202) 223-7200

*Counsel for Respondent
The Detroit News, Inc.*

RESTATEMENT OF QUESTION PRESENTED

Respondent The Detroit News, Inc. adopts the Restatement of Question Presented of Respondent, Detroit Free Press, Incorporated.

RULE 28.1 STATEMENT

As required by Supreme Court Rule 28.1, Respondent The Detroit News, Inc. hereby states that (1) it is a wholly-owned subsidiary of Gannett Co., Inc.; (2) it has no subsidiaries other than wholly-owned subsidiaries; and (3) its affiliates are the other subsidiaries of Gannett Co., Inc.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1988

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
v. *Petitioners,*

RICHARD THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF RESPONDENT
THE DETROIT NEWS, INC. IN OPPOSITION**

**REASONS WHY THE PETITION
SHOULD NOT BE GRANTED**

The Detroit News, Inc. and its parent, Gannett Co., Inc., remain fully committed to the joint operating arrangement in Detroit, and urge this Court to deny the petition for certiorari as expeditiously as possible.

Respectfully submitted,

LAWRENCE J. ALDRICH
GANNETT Co., INC.
P.O. Box 7858
Washington, D.C. 20044
(703) 284-6000

JOHN STUART SMITH
Counsel of Record
GORDON L. LANG
CORRINE M. YU
NIXON, HARGRAVE, DEVANS
& DOYLE
One Thomas Circle, N.W.
Suite 800
Washington, D.C. 20005
(202) 223-7200

*Counsel for Respondent
The Detroit News, Inc.*

5

No. 88-1640

Supreme Court, U.S.
FILED

APR 12 1989

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

**MICHIGAN CITIZENS FOR
AN INDEPENDENT PRESS, ET AL., PETITIONERS**

v.

**DICK THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DOUGLAS LETTER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

2496

QUESTION PRESENTED

Whether the court of appeals, on the record presented, erred in upholding the decision of the Attorney General of the United States approving an application filed by *The Detroit Free Press* and *The Detroit News* for a joint newspaper operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	13
Conclusion	20

TABLE OF AUTHORITIES

Cases:

<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	13
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	2
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983) ..	2, 11, 14, 16
<i>FMC v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973)	15
<i>Southern Pacific Communications Co. v. American Telephone & Telegraph Co.</i> , 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985)	16
<i>United States v. Doe</i> , 465 U.S. 605 (1984)	16
<i>United States v. First City National Bank</i> , 386 U.S. 361 (1967)	15, 16

Statutes:

Administrative Procedure Act, 5 U.S.C. 706	9
Newspaper Preservation Act, 15 U.S.C. 1801 <i>et seq.</i>	3
15 U.S.C. 1802(2)	3, 4
15 U.S.C. 1802(5)	3, 8
15 U.S.C. 1803(a)	3
15 U.S.C. 1803(b)	3, 17, 19
15 U.S.C. 1803(c)	4
Shipping Act, 1916, 46 U.S.C. 814	15

IV

Regulations:	Page
28 C.F.R.:	
Section 48.7	4
Section 48.10(b)	4
Section 48.11	4
Section 48.13(b)	4
Miscellaneous:	
H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970)	2
S. Rep. No. 535, 91st Cong., 2d Sess. (1969)	3

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1640

MICHIGAN CITIZENS FOR
AN INDEPENDENT PRESS, ET AL., PETITIONERS

v.

DICK THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 166a-197a) is not yet reported; the opinions filed in connection with the denial of the petition for rehearing (Pet. App. 198a-211a) are also not yet reported. The opinion of the district court (Pet. App. 149a-163a) is reported at 695 F. Supp. 1216. The decision of the Attorney General (Pet. App. 136a-147a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. A petition for rehearing was denied on February 24, 1989 (Pet. App. 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1910, a substantial percentage of the metropolitan newspapers in the United States have failed. As a result of this trend, a large majority of American communities are currently served by single newspapers. See H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3 (1970). In the 1930s, newspapers began to form "joint operating arrangements" (JOAs) to combat the prospects of financial ruin. Under the typical JOA, each newspaper reduced costs by combining the business aspects of publishing, but retained independent editorial and news staffs and policies. This mechanism proved to be successful in saving a number of newspapers. Indeed, by 1966, 22 such joint operating arrangements existed in the United States. *Id.* at 3-5.

In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), however, the Court held that the JOA between the two newspapers serving Tucson, Arizona, constituted an illegal merger under the Clayton Act, and involved prohibited price fixing, profit pooling, market allocation, and monopolization under the Sherman Act. In so holding, the Court strictly applied the "failing company" doctrine, which provides a defense to otherwise illegal business agreements when one of the firms involved is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. *Id.* at 136-139.

Congress acted swiftly to overturn the *Citizen Publishing* decision in 1970 by enacting the Newspaper Preservation Act (Act), 15 U.S.C. 1801 *et seq.* Congress recognized that unique economic forces affecting the newspaper industry called for specific federal action to preserve "[f]inancially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous and unpopular stands on public issues * * *." S. Rep. No. 535, 91st Cong., 2d Sess. 3 (1969); see *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), cert. denied, 464 U.S. 892 (1983). To accomplish this goal, Congress expressly permitted newspapers to enter into joint business operations before they reach the point of dire financial distress required by *Citizen Publishing*.

The Act authorizes the Attorney General to approve a new JOA if one of the newspaper applicants is a "failing newspaper" and approval of the JOA "would effectuate the policy and purpose of this [Act]." 15 U.S.C. 1803(b). The Act further defines a "failing newspaper" as one that "regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). The Act provides only a limited exemption from federal antitrust laws.¹ Newspapers entering into JOAs must maintain separate "editorial and reportorial staffs" and independent "editorial policies," 15 U.S.C. 1802(2), and may not engage in "any predatory pricing, any predatory practice, or any other conduct * * * which would be unlawful under ~~any~~

¹ The Act further provides that a JOA entered into before July 24, 1970 (the effective date of the statute) may remain in effect "if at the time at which such arrangement was first entered into, * * * not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication * * *." 15 U.S.C. 1803(a).

any antitrust law if engaged in by a single entity," 15 U.S.C. 1803(c). The Act, however, does permit newspapers to take joint action with regard to printing, time and method of publication, production, advertising and circulation rates, distribution and solicitation, and revenue distribution. 15 U.S.C. 1802(2).²

2. In May 1986, *The Detroit Free Press* and *The Detroit News* filed an application with the Attorney General for approval to work under a JOA. That application identified the *Free Press* as the newspaper in probable danger of financial failure.³ The proposed JOA provides that the *Free Press* will publish a weekday morning edition and the *News* will publish a separate weekday afternoon edition; one edition will be published on Saturday and Sunday, "with each paper assuming separate editorial and news responsibilities" (Pet. App. 115a (footnote omitted)). The two newspapers will maintain separate editorial and reportorial staffs, but will form a "partnership * * * which will control all of the business, commercial, and production aspects of publishing" each newspaper (*id.* at 116a).

In July 1986, the Assistant Attorney General for the Antitrust Division recommended against approval at that

² Under the Justice Department's regulations, an application for a JOA will be referred first to the Assistant Attorney General for the Antitrust Division. That official may recommend approving or rejecting the application. Alternatively, he may recommend that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If a hearing is held, the Antitrust Division becomes a party to the administrative proceedings. 28 C.F.R. 48.10(b), 48.11. The administrative law judge makes recommendations to the Attorney General, who then issues the final agency decision concerning the JOA application. 28 C.F.R. 48.13(b).

³ Knight-Ridder, Inc., owns the *Free Press*; Gannet Co., Inc., owns the *News*. Those firms are the country's largest newspaper groups. Pet. App. 150a.

time, but also suggested that the Attorney General convene an administrative hearing. The Attorney General accepted that recommendation, assigned the matter to an administrative law judge (ALJ), and designated the major relevant newspaper unions and the Mayor of Detroit as intervenors in the proceedings. Pet. App. 1a-3a, 150a-151a, 173a.⁴

3. a. The ALJ held a lengthy hearing and developed the evidentiary record for the Attorney General. That record shows that Detroit is one of the largest newspaper markets in the country, and that the *Free Press* and the *News* have for years competed fiercely in order to become the dominant paper in that market (Pet. App. 139a).⁵ As a result of this vigorous competition, in which neither paper has prevailed,⁶ both newspapers have low circulation and advertising prices. Both papers have also suffered sizeable operating losses throughout the 1980s. The *Free Press* encountered greater losses and consistently trailed the *News* in circulation and in advertising revenue. The *News*, however, also lost money from adopting market strategies aimed at improving its market position over the long term. *Id.* at 139a-140a.

The record also shows that, unlike the circumstances surrounding past JOA applications, the *Free Press* had not

⁴ The Mayor and the unions originally opposed the JOA. After the *Free Press* management announced in January 1988 that it would close the newspaper if the JOA application were denied, they withdrew that opposition. See C.A. App. 540-553.

⁵ It is our understanding that the term "dominant paper," as used by the parties and the ALJ in this case, means simply the paper that leads definitively in advertising revenue and circulation.

⁶ In 1976 and again in 1985, Knight-Ridder poured a considerable amount of investment capital into the *Free Press*, hoping to overcome the *News*, which was not then backed by the substantial resources of Gannett (Pet. App. 139a-140a).

yet fallen into a "downward spiral" in circulation toward inevitable failure (Pet. App. 138a).⁷ Nevertheless, the *Free Press* lost more than \$81 million between 1979 and 1986, and in 1986 alone, the *News* generated \$61 million more in advertising revenues than did the *Free Press*. Both newspapers could become profitable if they together raised prices and eliminated discounting. Since neither paper can raise its prices without regard to the conduct of the other, however, neither one is in a position to take unilateral action to gain profitability. *Id.* at 140a-141a.

b. In December 1987, the ALJ recommended against approving the JOA, concluding that the newspapers had failed to show that "losses * * * are traceable to an irreversible market condition which will probably lead to domination and the downward spiral" (Pet. App. 129a). The ALJ noted the current precarious financial condition of the *Free Press*, the testimony of Alvah H. Chapman, the Chairman of Knight-Ridder, that he would recommend closing the paper if the JOA were denied, and the testimony of various Gannett officials that the company would not ease the competitive pressure on the *Free Press* by raising prices at the *News* if the JOA were denied. The ALJ decided, however, that such evidence did not establish an irreversible trend towards market dominance by one of the newspapers. *Id.* at 130a-131a. In his view, "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies

⁷ The court of appeals explained the "downward spiral" phenomenon as follows (Pet. App. 171a):

Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper that is short on advertising, so circulation drops further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure.

* * * (id. at 132a). Under those circumstances, the "free market itself" should be permitted to take its course (*ibid.*).

4. On August 8, 1988, the Attorney General, having "accepted as accurate the fact findings of the Administrative Law Judge, but differ[ing] * * * with his ultimate conclusion as to where those facts lead" (Pet. App. 147a), approved the application for the JOA.

The Attorney General recognized not only the *Free Press*'s significant losses and the substantially greater advertising revenues of the *News*, but also the inability of the *Free Press* to take unilateral action "to restore the paper to a profitable position," and the lack of any "realistic prospect of outlasting the *News*" (Pet. App. 141a). In light of these facts, "the danger of financial failure, if not imminent, certainly seems 'probable'" (*ibid.*). Although noting the absence of the "proverbial 'downward spiral,'" the Attorney General found that "it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no prospect of extricating itself. Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the *Free Press* would have failed long ago." *Id.* at 142a-143a (citations omitted).⁸

⁸ In considering the testimony of Alvah H. Chapman, the Chairman of Knight-Ridder, that he would recommend closing the *Free Press* if the JOA were denied, the Attorney General noted that such a "prediction cannot be wholly disregarded" (Pet. App. 144a). As the Attorney General explained (*ibid.*):

It would be neither counterintuitive nor contradictory for Knight-Ridder to follow just such a course upon concluding, after all these years, that the *Free Press* no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses.

The Attorney General also noted that after the ALJ had issued his recommendation, Knight-Ridder had submitted information confirm-

Turning to the contention that both newspapers could become profitable simply by raising prices, the Attorney General noted first that “the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate” (Pet. App. 143a). He then observed that Gannett had disavowed an intention to raise the *News*’s prices. Although the ALJ had questioned the testimony of Gannett officials on this point, the Attorney General found that “it hardly reflects unsound business judgment” for the *News* to hold to its current pricing strategy “with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination” (*id.* at 143a, 144a). Accordingly, the Attorney General dismissed that objection.

Having found that the *Free Press* was in “probable danger of financial failure” under the Act, 15 U.S.C. 1802(5), the Attorney General determined that approval of the JOA would effectuate the policy and purpose of the Act. He accepted the ALJ’s finding that “this is not a situation where the *Free Press* has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement” (Pet. App. 145a). Rather, the record showed that “[k]eene competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly—has moved both newspapers into intractable loss positions from which only one, the *News*, now appears to

ing that the company would close the *Free Press* if the JOA were not approved. Because this information was submitted after the administrative record was closed, the Attorney General did not consider it. See C.A. App. 59 n.4 (this footnote was mistakenly omitted from the reprint of the Attorney General’s decision contained in the appendix to the petition for a writ of certiorari).

have any reasonable prospect of emerging” (*ibid.*).⁹ The Attorney General thus concluded that the purposes of the Act would be served by approving the JOA because a separate editorial voice would be saved in Detroit, “an outcome that does not appear to be in the future otherwise” (*id.* at 146a).

5. Petitioners then filed this action against the Attorney General and the two newspapers in the United States District Court for the District of Columbia. Petitioners challenged the Attorney General’s approval of the JOA as violating the Newspaper Preservation Act itself and the Administrative Procedure Act, 5 U.S.C. 706. On cross-motions for summary judgment, the district court upheld the Attorney General’s decision. Pet. App. 149a-163a.

As a threshold issue, the district court held that the Attorney General’s decision must be reviewed under the “arbitrary and capricious” standard set forth in the Administrative Procedure Act, not the “substantial evidence” test, because the Newspaper Preservation Act itself does not provide for an initial administrative hearing (Pet. App. 153a). Under that deferential standard of review, the court upheld the Attorney General’s ruling that a news-

⁹ The Attorney General also considered the argument that the newspapers should be denied permission to work under the JOA because they “openly pursued the JOA option over several years and saw it as a means of avoiding financial failure” (Pet. App. 145a). He found that the marketing strategy adopted by the newspapers had been in place for nearly ten years, and Knight-Ridder’s heavy investment in the *Free Press* during that period “belies the notion that it was principally pursuing any end other than market domination” (*id.* at 146a). Under the circumstances, the Attorney General concluded that pursuing a JOA was a reasonable management alternative. In his view, “newspapers cannot be faulted for considering and acting upon an alternative that Congress has created” (*ibid.*).

paper need not show "the traditional downward spiral" in order to qualify as a "failing newspaper" under the Act (*id.* at 155a). Similarly, the court concluded that the Attorney General's "presented ample support * * * for his finding that the *Free Press* is both 'suffering losses which more than likely cannot be reversed' and is in 'probable danger of financial failure'" (*id.* at 156a).

The district court rejected petitioners' contentions that the Attorney General mistakenly concluded that the *News* would not raise its prices if the JOA were denied and that he gave undue weight to the testimony that Knight-Ridder would close the *Free Press* under such circumstances. The court concluded that, on this record, the Attorney General was neither arbitrary nor capricious in determining that the closing of the *Free Press*, given its substantial losses and market position, would not be an illogical course of action. Pet. App. 157a-159a.

Turning to petitioners' argument that the newspapers' allegedly purposeful losses should have disqualified them for approval under the Act, the court accepted the premise of that position, but found that the losses in this case were real and resulted primarily from the newspapers' shared strategy of seeking the dominant position in the Detroit market (Pet. App. 159a-161a). It thus determined that the Attorney General had not acted unreasonably in approving the JOA when "the newspaper's losses are *primarily* the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail" (*id.* at 160a-161a). Here, the record showed that the prospect of a JOA played only a secondary role in the *Free Press*'s strategic decisionmaking (*id.* at 161a).

Finally, the court dismissed petitioners' charge that the Attorney General's decision was internally inconsistent, holding that there can be no such conflict where the At-

torney General had accepted only the ALJ's findings of fact, but not the inferences drawn from such facts (Pet. App. 161a-162a).

6. A divided panel of the court of appeals affirmed (Pet. App. 166a-197a). It first found that the "exact meaning of the linguistically imprecise phrase 'probable danger of financial failure' is not apparent from the [Newspaper Preservation Act] or the legislative history" (*id.* at 178a). The court of appeals thus decided to defer to the Attorney General's reasonable reading of the statute, which had been taken from the Ninth Circuit's self-described "commonsense construction" in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983), namely, "[i]s the newspaper suffering losses which more than likely cannot be reversed?" (*id.* at 478); see Pet. App. 175a, 178a-180a. The court acknowledged "the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly" (*id.* at 180a), but concluded that this aid to statutory construction should not be used to overturn a reasonable agency application of the Act to a particular set of facts (*id.* at 180a-181a).

The court of appeals then examined the Attorney General's decision and found it reasonable on the record presented. It accordingly upheld the Attorney General's views that the *News* had obtained a competitive advantage, that the *News* would not likely ease competitive pressure on the *Free Press* by raising prices in the future if the JOA were denied, and that there is a significant probability that the *Free Press* would close in the absence of JOA. Pet. App. 183a-189a. As the court stated, the Attorney General "obviously was concerned that if he gambled on the ALJ's prediction that both newspaper[s] were bluffing, Detroit would lose a newspaper" (*id.* at 187a).

Lastly, the court of appeals concluded that the Attorney General had sufficiently considered the potential problem "that the statute authorizing a JOA creates a self-fulfilling prophesy. Newspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing" — an approved JOA (Pet. App. 189a). Given the facts of this case, with the long history of stiff competition between the *Free Press* and the *News*, the court concluded that the Attorney General had acted reasonably in finding that market success was the principal goal of each newspaper, and that approval of the JOA was therefore within the purposes of the Act. *Id.* at 189a-190a.¹⁰

7. On February 24, 1989, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc (Pet. App. 198a-199a).¹¹ Petitioners then filed an application for a stay of the Attorney General's decision pending the filing and disposition of a petition for a writ

¹⁰ Judge Ruth Bader Ginsburg dissented (Pet. App. 191a-197a), concluding that the matter should be remanded to the Attorney General in order to have him explain the different standards governing approval of new and existing JOAs, and to address more precisely whether the two newspapers could actually achieve profitability on their own without the aid of a JOA.

¹¹ Chief Judge Wald, and Judges Mikva, Edwards, and Ruth Bader Ginsburg dissented (Pet. App. 198a-199a). Chief Judge Wald, joined by Judges Mikva and Edwards, issued an opinion expressing the view that further review was appropriate based on their disagreement with the Attorney General's conclusion regarding the probability that the *News* would not, in the absence of a JOA, provide relief to the *Free Press* by raising its prices (*id.* at 205a-211a). According to the dissent, the Attorney General's conclusion was contrary to "[c]lassic economic principles" (*id.* at 207a), and continued low pricing by the *News* would be "perilously close" to prohibited predatory pricing (*id.* at 209a). Under those circumstances, the dissent favored "perusal by an *en banc* court" (*ibid.*).

of certiorari. On March 3, 1989, the Chief Justice, sitting as Circuit Justice, denied the application for a stay. The next day, petitioners resubmitted the application to Justice Brennan, who granted a stay pending a further order by him or the Court. On March 20, 1989, the Court denied the application for a stay; Justices Blackmun and Stevens dissented.

ARGUMENT

The decision of the court of appeals upholding the Attorney General's approval of the joint operating arrangement is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the decisions below involve an application of the Newspaper Preservation Act to the specific set of facts pertaining to a particular newspaper market in one metropolitan area. Despite petitioners' contrary suggestion (Pet. 13), this case is an unlikely "roadmap" for any newspaper contemplating filing an application for a JOA. Accordingly, further review by this Court is not warranted.

1. a. Petitioners contend (Pet. 13-18) that the court of appeals' decision misapplied the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requiring courts to defer to an agency's reasonable interpretation of a statute Congress has trusted it to administer. Petitioners essentially claim that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to antitrust laws must be narrowly construed.

The court of appeals, however, did not depart from the established *Chevron* framework. The court fully recognized that courts should and often do use canons of con-

struction as intrinsic aids at the first stage of the *Chevron* analysis—determining whether Congress has spoken to the issue in question. These canons may make otherwise ambiguous statutory language clear, and thereby eliminate the need to rely on an agency's interpretation at all. Pet. App. 180a-181a. Following *Chevron*, the court merely held that, when the relevant statutory language has no clear meaning, a court should defer to an agency's reasonable application of the ambiguous statutory language to a particular set of facts. Moreover, the court did not suggest that canons of construction have no role to play at this second stage of the *Chevron* analysis. The court simply reached the unexceptionable conclusion that if the agency has reasonably applied an ambiguous statute to the precise facts before it, the administrative action should not be set aside merely because the agency has not specifically mentioned a canon. See *id.* at 180a-182a.¹²

b. Petitioners further argue (Pet. 14) that the court of appeals' decision conflicts with the only other reported appellate court decision construing the Newspaper Preservation Act, *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473 (9th Cir.), cert. denied, 464 U.S. 892 (1983), which stated that courts and the Attorney

¹² The court of appeals did suggest that if Congress did not have a specific intent on the issue in question, a court should not insist that an agency resolve the matter by applying a particular canon of construction based on substantive policy presumptions. But that suggestion is entirely consistent with *Chevron*. To insist that an agency resolve a matter solely by reference to a canon that reflects substantive policy presumptions would put the court rather than the agency in the position of resolving the issues left open by Congress. As the court of appeals correctly recognized (Pet. App. 180a (emphasis in original)), "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes."

General, in applying the Act, must be guided by the canon of construction governing application of the antitrust laws. There is, however, obviously no conflict between *Hearst* and this case. The Attorney General explicitly adopted the very reading of the Act set forth by the Ninth Circuit in *Hearst* (see Pet. App. 141a-142a), and nothing in the court of appeals' decision contradicts that approach (see *id.* at 175a).¹³

c. Petitioners also contend (Pet. 15-16) that the court of appeals' decision is at odds with pre-*Chevron* decisions by this Court applying the canon of construction governing application of the antitrust laws. In *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), the Court invoked that canon as an aid in holding that the Federal Maritime Commission's interpretation of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, conflicted with both the structure of the relevant statutory scheme and that statute's legislative history. 411 U.S. at 731-743. In so holding, the Court found that the structure of the statute itself made the proper reading of the statute "undeniably clear" (*id.* at 736). But the Court also confirmed the principle that a reasonable agency construction of a statute will be upheld so long as that construction does not conflict with a discernible statutory mandate or congressional policy, as the Court found it did in that case (*id.* at 745-746). Accordingly, the court of appeals' decision is wholly consistent with *Seatrain Lines*.¹⁴

¹³ Petitioners claim (Pet. 14) that the court of appeals recognized that the Attorney General's reading of the Act was a departure from past practice and inconsistent with the canon of construction upon which they rely. The part of the court of appeals' opinion cited by petitioners (Pet. App. 180a), however, recognizes neither of these points, and we are not aware of any such statements by that court.

¹⁴ In *United States v. First City National Bank*, 386 U.S. 361 (1967), also cited by petitioners (Pet. 16), the Court considered the

2. Petitioners also renew their attack on the Attorney General's factual finding, upheld by both the district court and the court of appeals, regarding the likely conduct of the *News* in the absence of a JOA. Specifically, petitioners condemn the Attorney General's finding that the *News* would maintain current low prices as being flatly inconsistent with "classic economic principles" (Pet. 22). It is well settled, however, that this Court ordinarily does not review factual findings that have not been disturbed on appeal. See, e.g., *United States v. Doe*, 465 U.S. 605, 614 (1984). In any event, Congress had no intention of incorporating a particular economic theory into the Act. As the Ninth Circuit correctly pointed out, Congress, in passing this statute, recognized that "unique economic forces operate in the newspaper industry." *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d at 480.¹⁵

weight to be given in judicial proceedings to an administrative decision under a statute explicitly providing for *de novo* judicial review. See 386 U.S. at 367-368. Here, by contrast, the Administrative Procedure Act calls for an entirely different standard of review. Accordingly, there is no conflict between this case and *First City National Bank*.

Petitioners' listing of various antitrust statutes (Pet. 16-17) is beside the point. If litigation should arise involving applications of those statutes, courts will look to the statutory language, legislative history, and accepted canons of construction in order to determine their meaning.

¹⁵ Petitioners claim (Pet. 22) that the Attorney General's finding that the *News* will not raise its prices in the absence of a JOA amounts to a conclusion that the paper will engage in illegal predatory pricing. The ALJ himself did not find that the aggressive competitive pricing measures taken by the two Detroit newspapers constituted illegal predatory pricing. See Pet. App. 128a n.303. The determination whether a firm is engaging in predatory pricing involves a complex inquiry. See *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 740 F.2d 980, 1002-1007 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985). Petitioners are wrong in asserting

3. Finally, petitioners assert (Pet. 19-22, 23-24) that the Attorney General's decision amounts to a misapplication of the Act that will allow newspapers in the future easily to qualify for approval of a JOA. In their view, the Attorney General has concluded that a newspaper, in order to obtain a JOA under the Act, must merely show that it has lost money over a period of years and that it will continue to do so. Thus, a newspaper need only slash its prices, forcing its competitor to do the same, and then apply for a JOA after losing money as a result of that self-inflicted price reduction. Petitioners accordingly assert that the Attorney General's decision provides an easy "roadmap" for newspapers to follow in order to qualify for JOAs, and that in so doing it will undermine the purposes of the Act.

Contrary to petitioners' suggestion, the Attorney General's decision cannot be viewed as a convenient guide for obtaining a JOA. The decision did not rely exclusively on one or two easily replicated factors in approving the JOA. The record shows clearly that the Attorney General gave weight to a variety of considerations in approving the

that the contemplated conduct by the *News* in the absence of a JOA can so surely be labelled as prohibited predatory pricing.

Petitioners also chastise the Attorney General (Pet. 22) for not explaining the difference between the standards to be used when ruling on a new JOA application and those for reviewing an application to continue an existing JOA. See 15 U.S.C. 1803(b). But this case does not present that issue since the newspapers only applied for approval of a new JOA. On this record, the Attorney General had no occasion to issue an advisory opinion regarding the standards applicable for continuation of an existing JOA. Petitioners simply misconceive the Attorney General's decision as announcing some sort of broad rule governing all applications for JOAs, both past and future. See pages 17-19, *infra*.

JOA in this case:¹⁶ (1) the *Free Press* has sustained operating losses each year from 1979 through 1986 totaling \$81 million (Pet. App. 141a); (2) those losses have increased each year except 1983 (*id.* at 76a-77a); (3) the *Free Press* would have failed long ago without substantial cash infusions by the newspaper's corporate parent (*id.* at 142a-143a); (4) because of the nature of the Detroit newspaper market, the *Free Press* cannot, by itself, take steps to earn a profit, *i.e.*, the newspaper cannot raise its prices unless the *News* does so, and federal antitrust laws prevent the newspapers from jointly agreeing to raise their prices (*id.* at 141a-142a); (5) the *News* enjoys a significant competitive advantage in advertising and circulation over the *Free Press* (*ibid.*); (6) the corporate parent of the *Free Press* has announced that it will close the newspaper if a JOA is denied (*id.* at 144a); (7) the *Free Press* and the *News* have engaged in fierce competition for approximately 25 years, long before they sought approval for a JOA (*id.* at 15a-19a); and (8) neither improper marketing practices nor mismanagement caused the poor financial condition of the *Free Press* (*id.* at 145a-146a).

On this record, a newspaper in another city could hardly use this case as a guide for obtaining the Attorney General's approval of a JOA. First, the newspaper would need to allege and prove all of the numerous factors listed

¹⁶ Petitioners seek to undercut this point by asserting that "five of the factors cited * * * are all variations on the contentions that the *Free Press* has sustained losses for many years, that the *Free Press* could not raise its prices unless the *News* did the same, and that the papers have been competing for a number of years" (Pet. 22). But it is clear that the Attorney General's decision to approve an application for a JOA depends not on such broad categorical facts as whether a newspaper has "sustained several years of losses and that it cannot unilaterally raise its prices" (Pet. 23), but rather on the particular set of circumstances giving rise to such facts.

above, or their equivalent. Second, even if a newspaper satisfied that evidentiary burden, it would not necessarily receive approval for a JOA, since the Attorney General can disapprove the application if it is inconsistent with the purposes of the Act. See 15 U.S.C. 1803(b). Thus, the Attorney General could deny the application if the record showed that two newspapers had deliberately created operating losses as a means of obtaining a JOA. This could be true even if ultimately obtaining a JOA had *not* been the exclusive goal of the applicant newspapers. See Pet. 24.

Finally, petitioners mistakenly assume that a competing newspaper will automatically agree to a JOA, which may offer profits greater than either paper could expect in a competitive market. There are a variety of additional competitive factors that newspapers must consider before deciding to apply for a JOA, and that the Attorney General may take into account before approving that application. For example, the effects on the particular market involved of a possible third urban newspaper, suburban and national newspapers, and other media such as radio and television must be taken into account. Moreover, newspapers in other cities may enjoy customer loyalty for a variety of reasons not present in Detroit. Consequently, there could be options for unilateral action by some financially troubled newspapers which are not available to the *Free Press*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON

Acting Solicitor General

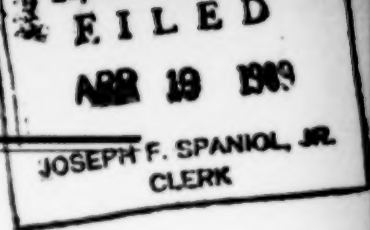
JOHN R. BOLTON

Assistant Attorney General

DOUGLAS LETIER

Attorney

APRIL 1989



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, et al.,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

April 19, 1989

71pp

TABLE OF AUTHORITIES

Cases:	Page:
<i>Chevron, USA v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), <i>cert. denied</i> , 464 U.S. 892 (1983)	2
<i>Group Life & Health Insurance Co., v. Royal Drug Co.</i> , 440 U.S. 205 (1979)	2

No. 88-1640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, et al.,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

Respondents make two basic points in urging this Court not to grant review. First, they argue that the "*Chevron* issue" was not decided by the Court below, and that this case is therefore not an appropriate one for deciding whether *Chevron* permits administrative agencies to interpret statutes inconsistently with firmly established rules of statutory construction. See *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Second, respondents argue that the issue that petitioners have raised under the Newspaper Preservation Act ("NPA") is fact-bound and not appropriate for review. Although both arguments are addressed in our opening brief, we reply briefly below.

1. Contrary to respondents' claim, the court below decided the *Chevron* issue. This is most apparent from Judge Ruth B.

Ginsburg's dissent, in which she observed that the case raises the question of whether *Chevron* did "indeed uproot a guide . . . to the antitrust law," namely the "well-recognized rule that antitrust exemptions must be narrowly construed." Pet. App. 195a-96 & n.6, citing *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983), and *Group Life & Health Insurance Co., v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). She also raised the question of whether "[u]nder *Chevron*, it is the Attorney General's prerogative to construe an ambiguously phrased antitrust law expansively." Pet. App. 196a n.6. "The answer to these questions," according to Judge Ginsburg, "unless and until Higher Authority tells us unambiguously otherwise, must be 'No.'" Id.

The panel majority restated Judge Ginsburg's argument as "suggest[ing] that the Attorney General's statutory construction is impermissible because it did not employ the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly." Pet. App. 180a. Its answer was that *Chevron* "implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes." Pet. App. 180a (emphasis in original). Underscoring its ruling on the *Chevron* issue, the panel majority declared that "[i]f a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another." Finally, the first line in the panel majority's concurrence in the denial of rehearing *en banc* chided the dissenters for overlooking "*Chevron*'s restraining leash." Pet. App. 200a. Thus, the *Chevron* issue was addressed and decided by the court below, as the Attorney General acknowledged in his statement of the case. Opposition 10.

The Attorney General does not seriously dispute the impor-

tance of the *Chevron* issue that petitioners have raised. Nor could he, since, as we pointed out in our opening brief, this Court has long relied on rules of statutory construction in reviewing agency decisions. See Petition 15-17. Thus, if the decision below is permitted to stand, agencies will be free to disregard rules of statutory construction, even those as specific and as entrenched as the rule at issue here.¹

2. On the NPA issue, respondents argue that the question presented by petitioners is fact-specific and therefore should not be reviewed by this Court. However, as we explained in our petition, the key to the Attorney General's opinion was his conclusion that the applicants were entitled to a joint operating arrangement ("JOA") if the newspaper designated as "failing" could show that it had suffered losses for a number of years and had no "unilateral way out" of its loss position. Petition 20-21.²

¹The Attorney General did assert that there is no authority for petitioners' claim that "the court of appeals recognized that the Attorney General's reading of the Act was a departure from past practice and inconsistent with the canon of construction upon which they rely." Opposition 13 n.13. In fact, these issues are discussed in the panel's opinion at Pet. App. 178a, 180a.

²This is also how the Attorney General initially described the case in the court of appeals. He argued that:

The record indisputably shows that the *Free Press* has in recent years sustained very substantial monetary losses as a result of fierce 'head-to-head' competition with the *News*. (Since 1980, these losses exceed \$56 million and are accelerating.) Most importantly for this case, there is an undisputed factual finding that there is *nothing* that the *Free Press* can do unilaterally to escape from its serious loss position. See slip op. 9 [Pet. App. 157a]. Given this fact, there is more than ample support for the finding that the *Free Press* is suffering losses that cannot likely be reversed and is in probable danger of financial failure. Slip op. 9-11 [Pet. App. 157a-159a].

Opposition by the Attorney General to Plaintiffs-Appellants' Emergency Motion for a Stay Pending Appeal, p. 5 (emphasis in original).

Thus, this case raises the legal issue of whether the minimal showing made here is sufficient to qualify a newspaper as being in "probable danger of financial failure" under the NPA. To be sure, the facts supporting each application will be different. But here the applicants were at competitive parity and had fought to a "virtual draw." Pet. App. 31a, 32a-85a; *see* Petition 6-7, 23. Therefore, the "failing newspaper" in future applications could not possibly be in any stronger position than the Free Press was here or it would be competitively superior. Because the facts supporting such an application will at least be as compelling as the facts here, any newspaper in a future application would qualify as failing if it could demonstrate that it has been losing money for a number of years and that it had no unilateral way to become profitable.

Since a paper with strong financial backing can create conditions that will meet that two-part test simply by inducing a price war and then declaring that it will not raise prices even if the JOA is denied, the Attorney General's novel interpretation of the NPA provides a roadmap to JOAs that jeopardizes the independence of newspapers in every city where newspapers still compete. Accordingly, the issue that petitioners have raised under the Newspaper Preservation Act also justifies plenary review by this Court.

3. Our final point relates to the Free Press's efforts to interject an irrelevant consideration into the case. Beginning with its question presented, ending with the concluding paragraph, and at several places in between, the Free Press threatens to cease operations if it is denied a JOA. Opposition i, 3, 7, 9, 22. The Administrative Law Judge rejected the Free Press's testimony on this point as not credible, and the Attorney General explicitly stated that he had not relied on similar statements placed in the record after the hearing. Pet. App. 104a-105a; Joint Appendix 59 n.4. *See* Petition 8.

Repetition of this self-serving threat does not make it relevant to whether the Court should grant the petition or to whether the decision below was correct. However, by relying on this threat, the Free Press highlights the basic flaw in the Attorney General's construction of the "failing newspaper" requirement, under which newspapers would have the ability to create a record that would be sufficient to obtain a JOA simply by inciting a price war and then relying on self-serving testimony of their chief officials. Surely, Congress never intended to give newspaper officials that kind of power when it enacted the NPA, and the importance attached by the Free Press to its threat to close only underscores the need for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

April 19, 1989

JUN 30 1989

No. 88-1640

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

June 30, 1989

50 pgs

QUESTIONS PRESENTED

1. In determining whether two competitively equal newspapers qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that only requires (a) a showing that both papers have lost money for several years and (b) a statement by representatives of the "non-failing" paper that it will not raise its prices even if the exemption is denied?

2. Does this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), require a reviewing court to defer to an administrative agency's expansive interpretation of an exemption from the antitrust laws where the agency's construction is at odds with the established rule that exemptions from the antitrust laws must be narrowly construed?

PARTIES TO THIS PROCEEDING

Petitioners Michigan Citizens for an Independent Press, Public Citizen, Senator John F. Kelly, W. Edward Wendover, David A. Kersh, William B. Cowan, Matthew Beer, and Murray Greenhalge, Jr., appeared as plaintiffs-appellants below.

Respondents United States Attorney General Dick Thornburgh, Detroit Free Press (owned by Knight-Ridder, Inc.) and The Detroit News (owned by Gannett Co.) appeared as defendants-appellees below.

In addition, the American Newspaper Publishers Association and Little Rock Newspapers, Inc. appeared as *amici curiae* in the court of appeals.

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS	2
STATEMENT	4
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. APPROVAL OF THE DETROIT JOINT OPERATING ARRANGEMENT ("JOA") IS CONTRARY TO THE NEWSPAPER PRESERVATION ACT.	15
A. The NPA May Not Be Interpreted to Encourage Profitable Newspapers to Engage in Behavior Leading to Approval of a JOA.	15
B. The Attorney General Violated the NPA Because His Decision Significantly Increases the Likelihood That Otherwise Profitable Newspapers Will Obtain JOAs.	21

1. The Record Establishes That the News and the Free Press Are Competitive Equals in a Market That Can Support Two Newspapers and That the Free Press Has Not Lost Ground in Recent Years.	22
2. The Attorney General's Decision Improperly Turns the NPA Into a Statute That Encourages Conduct That Will Inevitably Lead to Reduced Competition.	25
II. <i>CHEVRON</i> DOES NOT PROVIDE A BASIS FOR UPHOLDING THE ATTORNEY GENERAL'S DECISION.	29
A. <i>Chevron</i> Did Not Alter the Applicability of the Rule That Exemptions From the Antitrust Laws Must Be Narrowly Construed.	30
B. The Court Should Not Defer to the Attorney General's Construction of the NPA.	34
CONCLUSION	39

TABLE OF AUTHORITIES

Cases:	Page:
<i>Amoco Production Co. v. Gambell</i> , 480 U.S. 531 (1987)	31
<i>Bowen v. American Hospital Association</i> , 476 U.S. 610 (1986)	31, 38
<i>Bowen v. Georgetown University Hospital</i> , 109 S. Ct. 468 (1988)	31
<i>Chevron, U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	14
<i>Committee for an Independent P-I v. Hearst</i> , 704 F.2d 467 (9th Cir.), <i>cert. denied</i> , 464 U.S. 893 (1983)	20, 28, 29
<i>DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trade Council</i> , 108 S. Ct. 1392 (1988)	32
<i>Federal Maritime Commission v. Seatrain</i> , 411 U.S. 726 (1973)	14, 33, 35
<i>Federal Trade Commission v. Indiana Federation of Dentists</i> , 476 U.S. 447 (1986)	35
<i>Group Life and Health Insurance v. Royal Drug Co.</i> , 440 U.S. 205 (1979)	14, 29, 31
<i>Immigration and Naturalization Service v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	32

<i>International Shoe Co. v. FTC</i> , 280 U.S. 291 (1930)	16
<i>Lieberman v. FTC</i> , 771 F.2d 32 (2d Cir. 1985)	37
<i>Louisiana Public Service Commission v. FCC</i> , 476 U.S. 355 (1986)	31
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	14, 26-27
<i>NLRB v. Hearst Publications</i> , 322 U.S. 111 (1944)	34
<i>Niagara Frontier Tariff Bureau, Inc. v. United States</i> , 826 F.2d 1186 (2d Cir. 1987)	32
<i>Sorenson v. Secretary of Treasury</i> , 475 U.S. 851 (1986)	31
<i>Square D Co. v. Niagara Frontier Tariff Bureau</i> , 476 U.S. 409 (1986)	32
<i>United States v. First City National Bank</i> , 386 U.S. 361 (1967)	34
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	13, 19, 20, 36

Statutes and Regulations:

Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B)	19
Clayton Act, 15 U.S.C. § 18	15-16
Export Trading Company Act, 15 U.S.C. §§ 4001 <i>et seq.</i>	35
Federal Trade Commission Act, 15 U.S.C. § 45	35
Fishers' Coop Marketing Act, 15 U.S.C. §§ 521, 522	35
Interstate Commerce Act, 49 U.S.C. §§ 11343, 11344	35
Newspaper Preservation Act, 15 U.S.C. § 1801	4, 18, 38
15 U.S.C. § 1802(5)	4, 6, 17
15 U.S.C. § 1803(a)	4, 17, 37
15 U.S.C. § 1803(b)	<i>passim</i>
15 U.S.C. § 1803(c)	27
Sherman Antitrust Act, 15 U.S.C. §§ 1, 2	16
Shipping Act of 1916, 46 U.S.C. § 814	33
28 U.S.C. § 1254(i)	2
28 C.F.R. § 48.7 (1988)	5
28 C.F.R. § 48.10(a)(4) (1988)	8, 20

Legislative Authorities:

H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970)	16, 17
<i>The Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcommittee of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969)</i>	16, 37
<i>The Newspaper Preservation Act: Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. (1967)</i>	16
<i>The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcommittee on Antitrust and Monopoly Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969)</i>	37
S. Rep. No. 535, 91st Cong., 1st Sess. (1969)	17, 19, 36
S. 1520, 91st Cong., 1st Sess (1969)	17, 37
116 Cong. Rec. 2,006 (1970)	37
116 Cong. Rec. 2,017 (1970)	17
116 Cong. Rec. 23,146 (1970)	17, 19, 36
116 Cong. Rec. 23,148 (1970)	18
116 Cong. Rec. 23,154 (1970)	17
116 Cong. Rec. 23,179 (1970)	17

Other Authorities:

Areeda & Turner, <i>Predatory Pricing and Related Practices Under Section 2 of the Sherman Act</i> , 88 Harv. L. Rev. 697 (1975)	26
Bork, R., <i>The Antitrust Paradox</i> (1978)	26
McGee, <i>Predatory Pricing Revisited</i> , 23 J.L. & Econ. 289 (1980)	26
Report of the Assistant Attorney General, Public File No. 44-03-24-4 (January 6, 1978) (Cincinnati)	19
Report of the Assistant Attorney General, Public File No. 44-03-25-5 (May 19, 1980) (Chattanooga)	29
Report of the Assistant Attorney General, Public File No. 44-03-26-6 (May 29, 1981) (Seattle)	20
Supplemental Report of the Assistant Attorney General, Public File No. 44-03-25-5 (June 2, 1980) (Chattanooga)	19-20
45 Fed. Reg. 58, 733 (September 4, 1980)	29
47 Fed. Reg. 26, 472 (June 18, 1982)	29

No. 88-1640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS
FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals' panel (Pet. App. 166a - 90a) are reported at 868 F.2d 1285. The opinions regarding the court of appeals' order denying rehearing *en banc* (Pet. App. 191-97a) are reported at 868 F.2d 1300. The opinion of the district court (Pet. App. 149a-63a) is reported at 695 F. Supp. 1216.¹

¹"Pet. App. __" refers to the separately bound appendix to the petition for a writ of certiorari. "J.A. __" refers to the joint appendix submitted with this brief.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and the order denying rehearing *en banc* was entered on February 24, 1989 (Pet. App. 164a, 199a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466, 15 U.S.C. §§ 1801-04, provides in pertinent part:

Section 1801. Congressional declaration of policy.

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Section 1802. Definitions.

* * *

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

Section 1803. Antitrust Exemptions.

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July

24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication . . .

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

The Department of Justice's regulations pertaining to the Newspaper Preservation Act, 28 C.F.R. § 48 (1988), provide in pertinent part:

Section 48.10. Hearings.

(a) Upon the issuance by the Attorney General of an order for a hearing, the Assistant Attorney General for Administration shall appoint an administrative law judge in accordance with section 11 of the Administrative Proce-

dure Act, 5 U.S.C. 3105. The administrative law judge shall:

* * *

(4) Conduct a hearing in accordance with section 7 of the Administrative Procedure Act, 5 U.S.C. 556. At such hearing, the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act will be on the proponents of the arrangement.

STATEMENT

1. On May 9, 1986, respondents Detroit Free Press (the "Free Press") and The Detroit News (the "News") filed an application with the respondent Attorney General for approval of a joint operating arrangement ("JOA") pursuant to the Newspaper Preservation Act (the "NPA" or the "Act"), 15 U.S.C. §§ 1801 *et seq.*

As will be explained more fully below, the Newspaper Preservation Act of 1970 is Congress's response to this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), which held that a pre-existing JOA violated the antitrust laws. Recognizing that this Court's stringent standard might impose a hardship on newspapers that had been operating under a JOA for many years, Congress retroactively approved JOAs where, at the time of the agreement, at least one of the newspapers was not "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a). However, Congress adopted a more exacting standard for future JOAs, which are permitted only if one of the papers is a "failing newspaper," a term that the Act defines as a "newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5). Congress also provided that, in order to obtain an antitrust exemption, post-1970 JOAs must first

be approved by the Attorney General. 15 U.S.C. § 1803(b).

Detroit is the nation's fifth largest newspaper market. The News, the nation's seventh largest newspaper, is Detroit's only afternoon newspaper, and the Free Press, the nation's eighth largest newspaper, is the dominant, daily morning newspaper. Pet. App. 7a, 14a, 15a. The Free Press has been owned by Knight-Ridder, Inc. ("Knight-Ridder") or its corporate predecessor since 1940. The News was owned by the Evening News Association until 1986, when it was purchased by Gannett Co., Inc. ("Gannett"). Gannett and Knight-Ridder are the two largest newspaper chains in the United States.

The application identified the Free Press as the "failing newspaper." Pet. App. 137a. The JOA provides that the Detroit market would be divided between the two newspapers for the next 100 years. Under the agreement, the News would eliminate its morning, weekday edition. It would publish only an afternoon daily newspaper, and the Free Press would publish only a morning newspaper. The JOA also provides that the newspapers would publish a joint edition on Saturdays and Sundays and that the news and editorial staffs of the two newspapers would remain independent. Pet. App. 114a-16a.

The newspapers would form a partnership known as "The Detroit Newspaper Agency," which would make all commercial decisions for both papers, including setting their sales prices and advertising rates. The News would receive 55% of the profits during the first year, but that percentage would decrease until the beginning of the sixth year, after which the profits would be divided evenly. Pet. App. 173a.

In accordance with the Department of Justice's regulations, 28 C.F.R. § 48.7 (1988), the application was referred to then-Assistant Attorney General for Antitrust Douglas H. Ginsburg, who concluded in a 70-page report that the applicants had not carried their burden of establishing that the Free Press was a failing newspaper. He pointed out that there is a serious question

as to why the News is "willing to share 50% of the profits of the JOA with the Free Press (after the first five years) if, as the parties assert, 'the inescapable conclusion [is] that the financial losses of the Free Press will continue indefinitely [absent a JOA].'" J.A. 89-90 (brackets in original). However, to give the applicants another opportunity to prove their case, Assistant Attorney General Ginsburg recommended that Attorney General Edwin Meese III appoint an administrative law judge to hear evidence. *Id.* at 93.

2. Attorney General Meese referred the application to Administrative Law Judge ("ALJ") Morton Needelman, who presided over a three-week evidentiary hearing, at which 16 witnesses testified, and at which the Justice Department's Antitrust Division opposed the application. Pet. App. 1a, 5a-6a. On December 29, 1987, Judge Needelman issued a 129-page Recommended Decision, in which he made numerous findings of fact and concluded that the JOA should be denied. *Id.* Although Attorney General Meese ultimately approved the JOA, he expressly "accept[ed] as accurate the fact findings of the Administrative Law Judge." Pet. App. 147a. Therefore, the findings of the ALJ must be considered in reviewing the Attorney General's decision.

The principal issue before Judge Needelman was whether the Free Press was in "probable danger of financial failure." 15 U.S.C. §§ 1802(5), 1803(b). In order to resolve this question, the ALJ had to determine why the Free Press had been losing money and whether it would continue to do so if the JOA were denied. Based on the evidence in the record, Judge Needelman made a number of critical factual findings.

First, Judge Needelman found that Detroit could support two profitable newspapers. Thus, he concluded that the Free Press's financial troubles were not due to any inherent weakness in the relevant market or to competition from suburban newspapers,

radio, or television. Pet. App. 95a-98a, 122a.

Second, he agreed with the Antitrust Division that the two papers are competitive equals. Pet. App. 31a, 32a-85a. Thus, although in 1960 the News had a "substantial lead (183,751) over the Free Press in daily circulation," by 1976 "the daily circulation battle ha[d] been fought to a virtual tie," and since then "the Free Press's share of total daily circulation [had] never [fallen] below 49%." Pet. App. 40a. While the News led in advertising, the Free Press was dominant in the critical morning market and had other clear advantages over the News. Pet. App. 31a-39a, 106a-108a. And the division of profits, which the ALJ concluded would be "essentially . . . 50/50" (Pet. App. 122a), was powerful evidence, as the Antitrust Division had argued (J.A. 116), that the papers themselves believed they were at competitive parity.

Third, the ALJ found that the Free Press had lost approximately \$10 million per year since 1980, that the News had lost almost as much, and that the reason for these losses was that both newspapers' circulation and advertising prices were probably the lowest in the country for major daily newspapers. Pet. App. 70a, 76a, 82a, 84a; *see also* Panel Opinion at Pet. App. 172a. For example, the daily price of the News is fifteen cents, and the Free Press charges twenty cents. Pet. App. 172a. According to Judge Needelman, "[n]either paper can achieve profitability (or survive indefinitely if viewed on a stand-alone [basis]) so long as its parent-chain persists in its present strategy of sacrificing current profits for dominance and future profitability or a JOA." Pet. App. 122a. In other words, "Detroit cannot sustain two profitable papers when both are practically being given away." *Id.*

Fourth, Judge Needelman discussed the motivation for the low prices. He found that in 1981, after both papers had suffered their first year of losses in many years, the chief executive officers of Knight-Ridder, which owned the Free Press, and the Evening News Association, which then owned the News, had met and "emphasized that one or both newspapers needed to

continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects of a JOA would be 'ironclad.'" Pet. App. 19a. The ALJ also found that the Free Press subsequently adopted a marketing strategy with the objective of "achiev[ing] profitability through total market dominance . . . , and if that should fail, to force the News to accept a JOA on the Free Press's terms." Pet. App. 21a. Moreover, before purchasing the News in 1986, Gannett contacted Knight-Ridder "to determine if [it] was still interested in forming a JOA." Pet. App. 29a. The two newspaper chains then consummated the JOA only two months after Gannett purchased the News. Pet. App. 8a, 31a.

Fifth, Judge Needelman addressed the issue of whether the News was likely to raise its prices if the JOA were denied, which the News would have to do to return to profitability. This issue was critical because the ALJ found, and the Attorney General agreed, that a price rise by the News would enable the Free Press to become immediately profitable since it could then follow suit, eliminating any justification for a JOA. Pet. App. 95a-100a, 122a, 143a n.3. On this issue, the ALJ found that the applicants had not met their burden of proving that the News was likely to continue to keep its prices low (and thereby to lose money indefinitely). Pet. App. 92a, 132a; *see also* 28 C.F.R. § 48.10(a)(4) (1988) (burden of proving all pertinent issues on the proponents of the JOA). Instead, the ALJ concluded that the papers might raise their prices if the JOA were denied. Pet. App. 92a.

Summarizing the discussion portion of his opinion, Judge Needelman concluded that "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both." Pet. App. 132a. Having found that the applicants had not carried their burden of proving that the Free Press was in "probable danger of financial failure," Judge Needelman recommended that the Attorney General deny the application.

Pet. App. 133a.

3. On August 8, 1988, four days prior to leaving office, Attorney General Meese rejected the recommendations of the ALJ and the Antitrust Division and approved the application. He made no independent fact findings, but instead expressly accepted those of the ALJ. Pet. App. 147a. Indeed, the Attorney General did not cite any record evidence, but instead relied only on the findings of the ALJ. Pet. App. 136a-48a.

In his opinion, the Attorney General pointed out that the Free Press had sustained substantial losses since 1980 and that the News was ahead in terms of circulation and advertising revenue. Pet. App. 140a. However, he also recognized that the News had "suffered sizeable operating losses," and also had not "mov[ed] toward a position of market dominance." Pet. App. at 139a-40a. Like the Free Press, "the pricing and discount strategies adopted and maintained by the News so as to retain its market position defeated all prospects for its achieving profitability as well." Pet. App. at 140a.

Attorney General Meese found that both papers could become profitable if circulation and advertising prices were increased, but he concluded that the Free Press could not increase its prices unless the News did the same. Pet. App. 143a. Relying on testimony of Gannett officials that the News would not raise prices if the JOA were denied, he ruled that it was "probable" that the Free Press was in "danger of financial failure." Pet. App. 144a.

Attorney General Meese also concluded that the "prediction" of Knight-Ridder's chief executive officer ("CEO"), "who promised to recommend a closing of the *Free Press* if the JOA application is disapproved," could not be "wholly disregarded." Pet. App. 144a. However, he cautioned that this testimony could not be given "undue weight," citing a finding by Judge Needelman that: (1) the record "contains no convincing evidence that [the CEO] seriously considered closing the Free Press prior to his

witness stand bolt out of the blue"; (2) there was no evidence that the Knight-Ridder Board had considered this recommendation, but, "on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied"; and (3) "Knight-Ridder has never shut down a single paper, and [the CEO] did not rule out finding a buyer interested in operating the Free Press should it ever reach the point when Knight-Ridder would no longer wish to challenge Gannett for the rich Detroit market." *Id.*; Pet. App. 104a-05a.

Finally, the Attorney General addressed the argument that "the prospect of a JOA, not competition for market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate discounting." Pet. App. 145a-46a. Recognizing that the desire to obtain a JOA was a factor in its below-cost pricing strategy, he concluded that Knight-Ridder was "principally" pursuing the goal of market domination and accordingly approved the JOA. Pet. App. 146a-47a.²

4. Petitioners filed this case in the United States District Court for the District of Columbia on August 16, 1988. Petitioners are Michigan Citizens for an Independent Press ("Michigan Citizens"), Public Citizen, and six individuals. Michigan Citizens has over 500 members, including approximately 200 employees of either the News or the Free Press, more than 300 readers, and 13 advertisers of one or both papers.

²In a footnote, the Attorney General noted that after the ALJ's decision, Knight-Ridder made certain "maneuvers" in order "to underscore its corporate intention to close the *Free Press* if there is no approval of the JOA." J.A. 150 n.4. Since these efforts occurred *after* the hearing record had been closed, the Attorney General stated that he had not considered them. *Id.* For the same reason, this Court should not give weight to Knight-Ridder's restatement of this threat. See Detroit Free Press Brief in Opposition to the Petition for Writ of Certiorari, pp. i, 3, 7, 9, 22.

The individual petitioners represent the same range of interests as Michigan Citizens. Public Citizen is a national consumer organization which brought this action on behalf of its members in the Detroit area, as well as its members nationwide who might be adversely affected by the precedent that would be established if the JOA in this case were approved. The defendants below and respondents here are the Attorney General of the United States, the Free Press, and the News.

On August 17, 1988, District Judge Joyce Hens Green stayed the Attorney General's order. J.A. 169. Thereafter, District Judge George H. Revercomb ruled against petitioners on the merits. Pet. App. 149a. Relying on *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), Judge Revercomb concluded that the courts were required to "grant considerable deference" to the Attorney General's interpretation of the NPA. Pet. App. 155a. Although he described as "disconcerting" the Attorney General's response to the argument that the newspapers would not have engaged in reckless, destructive competition without the cushion of a JOA (Pet. App. 160a), Judge Revercomb held that the Attorney General's decision was not arbitrary or capricious. Pet. App. 162a.

A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. After reviewing the statutory language and its legislative history, Judge Laurence Silberman, joined by Judge Spottswood W. Robinson, III, held that the "exact meaning" of the term "probable danger of financial failure" was "not apparent" and that, under *Chevron*, the Attorney General's interpretation of the statute was permissible and must be upheld. Pet. App. 178a. The panel then held that the Attorney General had the discretion to find that the Detroit JOA applicants had met the requirements of the NPA.

The panel implied that the result would have been different if it had applied the rule of statutory construction that exemptions from the antitrust laws are to be narrowly construed. Pet. App.

180a. It declined to apply the rule in interpreting the Newspaper Preservation Act, however, finding the statutory language ambiguous. The Court, therefore, held that the Attorney General was free to ignore the rule in the exercise of his discretion. Pet. App. 180a-81a.

Judge Ruth B. Ginsburg dissented and would have remanded the case to the Attorney General for further consideration. Pet. App. 191a-97a. In her view, the structure of the statute, its legislative history, the antitrust rule, and the burden of proof which JOA applicants bear all demonstrated that the Attorney General had not correctly interpreted the legal standard that Congress had adopted in the NPA. Pet. App. 194a-96a. She also was concerned that “[m]aking the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the ‘frame of reference [Congress] essentially embraced’” in the NPA. Pet. App. 197a, quoting Attorney General’s Decision and Order at Pet. App. 146a.

The court of appeals denied a petition for rehearing *en banc* by a vote of 5-4. Chief Judge Wald, in an opinion joined by Judges Mikva and Edwards, dissented on the ground that the predicate for the Attorney General’s decision — that if the JOA were denied, the News would not raise its prices, causing the Free Press to continue to lose money — made “no economic sense” because such a course of action would mean that the News would also continue to suffer deep losses. Pet. App. 205a. She pointed out that the News’s strategy amounted to predatory pricing, behavior which is inconsistent with the purposes of the antitrust laws and which the NPA does not authorize. Pet. App. 208a-09a. In response, the panel majority emphasized that its decision was required by “*Chevron’s* restraining leash.” Pet. App. 200a.³

³Judges Starr and D.H. Ginsburg did not participate. Judge Ruth B. Ginsburg voted to grant rehearing *en banc*, but did not join Chief Judge Wald’s opinion.

On March 20, 1989, this Court vacated the stay of the JOA that had previously been issued, removing the only legal obstacle to implementation of the JOA. Nevertheless, the newspapers have not consummated the joint operating arrangement. The Court granted the petition for a writ of certiorari on May 1, 1989.

SUMMARY OF ARGUMENT

I. The Newspaper Preservation Act did not authorize the Attorney General to approve the Detroit JOA application. Congress preferred competition to joint operation, and therefore it intended the “probable danger of financial failure” standard to be narrowly construed. The antitrust exemption is available only where it is likely that one of the newspapers would otherwise be eliminated by normal market forces.

Evidence of Congress’s intent is found in the Act’s language, its statement of policy, its structure, and its legislative history. In the past, the Justice Department has consistently followed the direction in the legislative history that the NPA incorporates the standard in the Bank Merger Act, as interpreted by this Court in *United States v. Third National Bank*, 390 U.S. 171 (1968). *Third National Bank* requires an exploration of alternatives to a merger and denies an analogous antitrust exemption to banks whose financial failure is attributable to mismanagement or other improper practices.

The Attorney General’s decision upsets the balance that Congress struck. Under his interpretation of the NPA, profitable newspapers in competitive markets would have an incentive to engage in price wars with the goal of achieving dominance and monopoly profits or, alternatively, approval of a lucrative JOA. One newspaper would only have to lower prices to the point where both it and its competitor were losing substantial sums of money. If the competitor survives, then the papers would qualify

for an antitrust exemption, as long as officials from the paper not designated as "failing" testify that they will not raise their prices regardless of whether the JOA is denied.

This interpretation of the Act must be evaluated in light of settled antitrust doctrine which holds that in healthy, competitive markets, predatory pricing strategies "are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). As the ALJ found, the reason that the newspapers in Detroit were willing to bear substantial losses for a sustained period of time was that they believed that they could qualify for a JOA if one of the papers did not prevail. Even the Attorney General and the panel majority below concluded that the prospect of a JOA was a factor in the reckless competition that had occurred in Detroit. *Matsushita* teaches that newspapers are unlikely to adopt such a scheme if an antitrust exemption is not available as a consolation prize.

If the strategy employed here is rewarded with an exemption from the antitrust laws, then it is likely that newspapers in other, competitive markets will follow the Detroit example. This interpretation of NPA would subvert one of its basic goals, which was to preserve competition in the newspaper industry. Therefore, the Attorney General's approval of the antitrust exemption must be set aside.

II. Nothing in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), required the court of appeals to defer to the Attorney General's expansive construction of the NPA. To the contrary, this Court's established precedents require that the Newspaper Preservation Act, like all other exemptions from the antitrust laws, be construed narrowly. *See, e.g., Group Life and Health Insurance v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). Although *Chevron* was decided after *Royal Drug*, it explicitly directs courts to use "traditional tools of statutory construction" to determine whether "Congress had an

intention on the precise question at issue" (*id.* at 843 n.9), which includes use of the antitrust rule. This rule must also be used in determining whether the Attorney General's interpretation of the Newspaper Preservation Act is reasonable and supportable. *Federal Maritime Commission v. Seatrain*, 411 U.S. 726, 731 (1973).

Other factors counsel against giving any special deference to the Attorney General's construction of the NPA. The most important consideration is the lead role that the courts have historically taken in interpreting the antitrust laws. Indeed, the NPA's legislative history demonstrates that Congress assumed that the task of resolving legal issues arising under the Act would remain the province of the courts. Moreover, the Attorney General has no expertise in the antitrust field, and he rejected the recommendation of the expert Antitrust Division. Finally, the NPA does not require the resolution of competing policy issues since Congress made the important choices in the Act.

ARGUMENT

I. APPROVAL OF THE DETROIT JOINT OPERATING ARRANGEMENT IS CONTRARY TO THE NEWSPAPER PRESERVATION ACT.

A. The NPA May Not Be Interpreted to Encourage Profitable Newspapers to Engage in Behavior Leading to Approval of a JOA.

The Newspaper Preservation Act was Congress's response to *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). In that case, this Court affirmed a decision against two newspapers in Tucson, Arizona, that had been operating jointly since 1940 under an agreement that provided for price fixing, profit sharing,

and market control. It held that their agreement violated sections 1 and 2 of the Sherman Antitrust Act, as well as section 7 of the Clayton Act, 15 U.S.C. §§ 1, 2, 18, unless the papers could meet the traditional failing company test spelled out in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). The Court then ruled against the newspapers since they had been unable to demonstrate that, at the time they entered into the agreement, one of them was “on the verge of going out of business.” 394 U.S. at 137.

At that time, 59 newspapers in 22 cities were published pursuant to joint operating agreements. H.R. Rep. No. 1193, 91st Cong., 2d Sess., p. 4 (1970). Some of these agreements were more than 30 years old (*id.* at 5), and a significant number had received approval from the Department of Justice. *The Newspaper Preservation Act: Hearing on H.R. 279 Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 91st Cong., 1st Sess., pp. 22-23 (1969) (hereinafter “1969 House Hearings”) (statement of Rep. Matsunaga). Even before this Court’s decision in *Citizen Publishing*, the Senate had held hearings to consider the potential impact of the Justice Department’s decision to initiate antitrust lawsuits against newspapers that were parties to JOAs. *The Newspaper Preservation Act: Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967).

The issue was extremely controversial. More than 40 bills were introduced; 28 days of hearings were held; and the debates consume 100 pages of the Congressional Record. As enacted, the NPA adopted two distinct standards for JOAs, depending on whether the agreement was executed before or after July 24, 1970, the Act’s effective date. Recognizing that a demanding standard might pose a hardship for the newspapers that had been operating under a JOA for many years, Congress provided that pre-enactment JOAs would be exempt if, at the time of the initial

agreement, one of the parties to the agreement was not “likely to remain or become a financially sound publication.” 15 U.S.C. § 1803(a). This provision has had the effect of grandfathering the pre-1970 JOAs.

Initially, the Senate sponsors proposed that this same standard govern post-enactment JOAs. S. 1520, 91st Cong., 1st Sess. § 3(5) (1969). However, the Senate Judiciary Committee modified the bill to include papers either “unlikely to remain or become a financially sound publication” or in “probable danger of failure,” and the Senate enacted the bill in that form. S. Rep. No. 535, 91st Cong., 1st Sess., pp. 1-2 (1969); 116 Cong. Rec. 2 017-18 (1970). The House rejected the Senate’s definition of failing newspaper for future JOAs and passed a bill which limited a “failing newspaper” to one in “probable danger of financial failure.” 116 Cong. Rec. 23,179-80 (1970). This narrow standard was enacted into law. 15 U.S.C. § 1802(5).

The legislative history underscores the statutory language; it demonstrates that the House approach contained a “tougher” and “much more stringent” standard than the “not likely to remain or become financially sound” standard which applied to pre-1970 JOAs. 116 Cong. Rec. 23,154-55 (1970) (remarks of Rep. Railsback).⁴ In his introductory remarks as floor manager of the bill, Representative Kastenmeier explained that the bill had gone through three generations, with the exemption being narrowed each time. 116 Cong. Rec. 23,146 (1970). In the third stage of consideration, Representative Railsback had “further limited the bill to provide a far more stringent test for any future joint operating agreements.” *Id.* In contrast to the “relatively more liberal standard” applicable to existing arrangements, Representative Railsback later assured the House of Representatives that

⁴See also H.R. Rep. No. 1193, *supra*, p. 10 (standard applicable to pre-1970 JOAs “less strict” than standard applicable to post-1970 JOAs).

the "prospective availability of the exemption has been sharply restricted." *Id.* at 23,154. Thus, in the end, Congress adopted a standard which would promote competition and would require that the antitrust laws continue to apply to newspapers, unless a JOA was "demonstrably essential" to prevent one newspaper from closing. 116 Cong. Rec. 23,418 (1970) (remarks of Rep. McCulloch). In that situation, the Act authorizes the Attorney General to grant an exemption from the antitrust laws because Congress preferred two newspapers operating under a JOA to a single, monopoly paper.

The debate over the scope of the exemption demonstrates that Congress was concerned that healthy newspapers might be tempted to take advantage of the Act. The reason for this concern is obvious: newspapers can make far greater profits in a shared monopoly market than in a competitive one. For example, while neither Detroit paper has earned more than \$14 million during any year since 1963, Gannett projects that after four years the Detroit JOA would earn \$100 million in yearly profits. Pet App. 76a-77a, 84a-85a; J.A. 25.

The NPA and its legislative history demonstrate that Congress intended to ensure that the Act would not encourage newspapers to alter their behavior in order to obtain a JOA. The Act defines "failing newspaper" as newspapers that are in "probable danger of financial failure." This definition excludes newspapers that might fail for other reasons, including the desire to obtain an exemption from the antitrust laws. This prohibition is reinforced in the statement of policy, which emphasizes "the public interest of maintaining a newspaper press [that is] competitive in all parts of the United States." 15 U.S.C. § 1801. Congress also explicitly directed the Attorney General to insure that approval of a JOA would "effectuate the policy and purpose" of the Act, 15 U.S.C. § 1803(b), which even Attorney General Meese recognized would preclude him from approving a JOA for a failing paper that had lost money *solely* in order to obtain the exemption. Pet.

App. 114a, 145a-46a.⁵

The legislative history of the NPA also demonstrates that Congress intended that the exemption would not be available to newspapers that could technically qualify as "failing," but for which conferring an antitrust exemption would be inappropriate in light of the purposes of the NPA. For example, the Senate Judiciary Committee's report stated that the "probable danger of financial failure" standard should be read in light of *United States v. Third National Bank*, 390 U.S. 171 (1968), where this Court narrowly interpreted the antitrust exemption in the Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B). S. Rep. No. 535, *supra*, p. 2; *accord*, 116 Cong. Rec. 23,146 (1970) (remarks of Rep. Kastenmeier). This reference to *Third National Bank* is significant because that case held that an analogous antitrust exemption required banks to "reliably establish the unavailability of alternative solutions to the woes" of the bank in order to obtain the exemption. 390 U.S. at 190.

The Justice Department has historically used the *Third National Bank* standard as a benchmark in considering JOA applications. The case was discussed at length in the Antitrust Division's Report when newspapers in Cincinnati, Chattanooga and Seattle applied for JOAs in 1977, 1980 and 1981.⁶ The Ninth

⁵The district court recognized that the Attorney General's formulation of this issue — whether "the prospect of a JOA, not competition for market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate [advertising] discounting" (Pet. App. 146a) — was a "strawman." As the court correctly pointed out, a "key concern of both the ALJ and the chief of the Justice Department's Antitrust Division" was that "both newspapers felt free to adopt bold strategies of price-cutting in an effort to gain market domination because they were secure in the belief that 'failure too had its reward in the form of JOA approval.'" Pet. App. 160a, *citing* ALJ Recommended Decision at Pet. App. 121a, 132a-33a.

⁶Report of the Assistant Attorney General, Public File No. 44-03-24-4, pp. 18-22 (January 6, 1978) (Cincinnati); Supplemental Report of the Assistant
(footnote continued)

Circuit relied on this standard in *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 476 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). Both the Antitrust Division and the Administrative Law Judge adopted the standard in this case as well. J.A. 101-02; Pet. App. 125a-26a.

The *Third National Bank* standard required Attorney General Meese to look behind the losses that the Free Press had suffered and to consider both whether the losses were caused by mismanagement and whether there were reasonable alternatives to the JOA that could avoid the necessity of joint operation. As Judge Silberman observed in his opinion for the panel majority, under *Third National Bank*, and thus under the NPA, "strong evidence of probable failure was required." Pet. App. 178a.

The final hurdle imposed by the Act, recognized by the Department of Justice, is that "the burden of proving that the proposed arrangement meets the requirements of the Newspaper Preservation Act [is] on the proponents of the arrangement." 28 C.F.R. § 48.10(a)(4) (1988). Only by imposing a rigorous standard on JOA applicants can Congress's interest in reserving the exemption for newspapers that otherwise would likely have ceased publication be protected.

At various times in the proceedings concerning the Detroit JOA, the parties, including petitioners, have suggested comprehensive definitions of "probable danger of financial failure." For example, the Administrative Law Judge concluded that "there must at least be convincing evidence of an irreversible economic condition that would produce domination and a downward spiral," where declining circulation and advertising revenues feed each other until the newspaper is forced to close. Pet. App.

Attorney General, Public File No. 44-03-25-5, pp. 17-19 (June 2, 1980) (Chattanooga); Report of the Assistant Attorney General, Public File No. 44-03-26-6, pp. 7-9 (May 29, 1981) (Seattle). Copies of these reports have been lodged with the Clerk of the Court.

126a. However, in this case, the Court need not formulate an all-inclusive test, but can overturn the approval of the application because the prospect of a JOA was an essential factor in the Free Press's losses and because approval of the Detroit application would jeopardize healthy newspapers in other cities.

B. The Attorney General Violated the NPA Because His Decision Significantly Increases the Likelihood That Otherwise Profitable Newspapers Will Obtain JOAs.

As the Attorney General indicated in his decision, in enacting the NPA, Congress's "frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the 'downward spiral' phenomenon due to external market forces," and this is how the NPA has "[t]raditionally" been applied. Pet. App. 141a, 146a. It is undisputed, however, that "[n]o such description fits either newspaper here." Attorney General Decision and Order at Pet. App. 141a. In addition, the Attorney General found that the newspapers' losses were not due to any inherent weakness in the Detroit market, and that in fact "the Detroit market *could* sustain two profitable newspapers" if prices were in line with the prices charged in other cities. Pet. App. 143a (emphasis in original).

In section 1 below, we discuss the Administrative Law Judge's findings, which were all adopted by the Attorney General. Pet. App. 147a. In section 2, we demonstrate that the Attorney General's interpretation of the Act is contrary to Congress's intent and that it would significantly increase the likelihood of additional JOAs in markets that would remain competitive under a proper interpretation of the Act.

1. The Record Establishes That the News and the Free Press Are Competitive Equals in a Market That Can Support Two Newspapers and That the Free Press Has Not Lost Ground in Recent Years.

In their public announcement of the JOA, Knight-Ridder and Gannett declared that “[o]ver a period of more than a quarter century since this became a two-newspaper city, the Free Press and The News have fought to a virtual draw.” Pet. App. 31a. The Administrative Law Judge concluded that this statement accurately described the relative positions of the two newspapers (Pet. App. 31a-85a), a finding that Attorney General Meese did not disturb and implicitly accepted. Judge Needelman based this finding on a number of critical, undisputed facts.

First, as the Antitrust Division had emphasized, prior to applying for the JOA, the Free Press had not been losing ground to the News. J.A. 101-06. Between 1976 and 1986, when the JOA application was filed, the Free Press’s share of daily circulation never fell below 49%. Pet. App. 41a. As the Antitrust Division also pointed out, competition today “is as close, or closer, than it was a decade ago.” J.A. 97.

Judge Needelman further found that as recently as 1985 — a year before the papers negotiated the JOA — Knight-Ridder executives believed that the Free Press was in a position to become the dominant newspaper in Detroit. Pet. App. 24a-25a. One key factor was the Free Press’s commanding lead in the critical morning market, which was thought to give it a substantial long-term strategic advantage over the News. In fact, in 1985, Knight-Ridder concluded that its campaign to gain circulation for the Free Press was working so well that it justified a \$22.3 million capital investment for an expansion of one of the paper’s printing plants. Pet. App. 25a-26a.

Although this additional capacity was designed to benefit the Free Press in its battle with the News, it was not scheduled to be

available until six months after the JOA application was filed. Pet. App. 27a. In fact, Judge Needelman concluded that “as late as June 1986 [a month after the JOA application had been filed], Lawrence, the Free Press’s publisher, was planning for an expansion ‘regardless of the outcome of the JOA.’” Pet. App. 104a n.242. As Judge Needelman found, the decision to expand the printing plant “indicated confidence in the [1985] predictions of Free Press executives that the investment would eventually bring dominance . . .” Pet. App. 25a.

Second, the ALJ endorsed the Antitrust Division’s argument that the 50/50 profit split between the News and the Free Press was persuasive evidence that the papers themselves did not believe that the Free Press was in “probable danger of financial failure.” Pet. App. 113a-14a; 122a; J.A. 115-17. According to the testimony of the Antitrust Division’s expert witness, which was adopted by Judge Needelman, “the JOA profit split represents a recognition by Gannett that the Free Press would remain in existence for at least seven to ten years; otherwise, Gannett would have found it more profitable to wait for the Free Press to fail.” Pet. App. 113a. The profit split alone is telling evidence that neither newspaper had a significant edge when they submitted their JOA application. Moreover, the ALJ found that, during the JOA negotiations, it was an open question which paper would be designated as “failing,” a finding that further buttresses the conclusion that the newspapers were essentially competitive equals. Pet. App. 30a.

Third, the ALJ concluded that the Free Press was a healthy paper and had a number of competitive advantages over the News. The most important evidence on this issue is a January 20, 1986 memorandum from Knight-Ridder’s CEO, on behalf of the Free Press, to Gannett’s CEO, which the ALJ reprinted in full in his Recommended Decision (Pet. App. 32a-38a). This memorandum was written about the time Gannett acquired the News, less than two months before the papers signed the JOA. Accord-

ing to the memorandum:

the Free Press has "clear leadership in the critically important morning field" (Pet. App. 32a);

"the Free Press has greater overall readership" than the News (Pet. App. 34a; *see also* Pet. App. 55a);

"the Free Press is the dominant daily paper among adults in virtually all upscale demographic categories" (Pet. App. 35a);

over the five previous years, the Free Press's circulation figures had improved in every area, and it had outgained the News in a number of important areas (Pet. App. 33a-34a);

"[t]he Free Press has improved [its] advertising share of field over time" (Pet. App. 33a, 36a);

the Free Press has won far more journalistic prizes than the News (Pet. App. 37a);

according to the Free Press's CEO, "we think the figures reflect the Free Press' increasingly strong competitive position" (Pet. App. 34a).

Although Judge Needelman credited the applicants' testimony that this memorandum was written to argue the Free Press's case during the JOA negotiations, he concluded that it "was a reasonable summary of the data available at that time." Pet. App. 39a.

Furthermore, just two months prior to signing the JOA, John W. Morton, one of the expert witnesses for the applicants and a nationally recognized newspaper analyst, "was of the view that if the Detroit newspaper war was to continue, the News was 'at greater risk' than the Free Press." Pet. App. 112a. According to Judge Needelman, "Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning

franchise it was positioned to avoid the downward spiral and overtake the News." *Id.* As the Antitrust Division summarized the facts in its Post-Hearing Brief, "[a]lthough the record shows that the Free Press has not achieved its stated goal of dominance in the Detroit market, it also shows that until the very moment the JOA was announced, Free Press executives believed that substantial progress was being made." J.A. 113.

2. The Attorney General's Decision Improperly Turns the NPA Into a Statute That Encourages Conduct That Will Lead to Reduced Competition.

During the five years prior to applying for the JOA, the News and the Free Press lost an average of nine and eleven million dollars per year, respectively. Pet. App. 77a, 85a. According to the Attorney General and the ALJ, the reason for these losses was below-market pricing of both circulation and advertising. Pet. App. 143a n.3. Yet the Attorney General concluded that the papers were entitled to a JOA because the Free Press had no unilateral way out of its loss position: as long as the News was willing to continue to incur heavy losses, the Free Press could not raise its prices without losing circulation and advertising. Pet. App. 143a. To support his conclusion that the Free Press would not raise its prices, the Attorney General relied on testimony from the News's chief executive officer that it would continue to sustain large losses in an effort to gain dominance over the Free Press, even if the JOA were denied. Pet. App. 143a-44a.

This interpretation of the Act gives profitable newspapers in competitive markets a roadmap for obtaining a lucrative antitrust exemption. The first step would be for one paper to set its advertising rates and circulation prices significantly below the level necessary to make a profit. The second paper would then have to lower its prices in order to maintain its competitive position. Soon both papers would be losing money, and neither

would have a unilateral way to become profitable. Relying on the Attorney General's interpretation of the Act, after several years of losses, either paper could then be designated as "failing" so long as its competitor testified that it would not raise prices even if the JOA were denied. Pet. App. 141a, 142a-44a; *see also* Panel Opinion at Pet. App. 176a, 177a, 184a-86a.⁷

The problem with this interpretation of the NPA is that it provides an incentive for newspapers in healthy markets to engage in conduct that will lead to losses and eventually an exemption from the antitrust laws. Thus, absent the fall-back of a lucrative JOA, there would be no reason for any newspaper to assume the enormous risk of losing money for years in the hope of driving a competitor from the market. As Chief Judge Wald pointed out, "[c]lassic economic principles and basic antitrust law run counter to any prediction that sophisticated firms will pursue below-cost pricing strategies over the long haul."⁸ This is because "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Thus, intention-

⁷The possibility of one newspaper driving an unwilling competitor into a JOA is not idle speculation. As described in the *amicus curiae* brief of Little Rock Newspapers, Inc. (publisher of the *Arkansas Democrat*), Gannett, the owner of The Detroit News, has cut prices and thereby transformed the *Arkansas Gazette*, which it also owns and which competes with the *Arkansas Democrat*, from a profitable newspaper into one that is losing several million dollars per year. On August 14, 1988, six days after the Attorney General approved the Detroit JOA, but before this case had been filed, Gannett increased the pressure on the *Arkansas Democrat* by further cutting the *Gazette's* circulation price to all subscribers, this time by 57.5%. *Amicus Curiae* Brief, p. 2.

⁸Pet. App. 207a (emphasis in original), citing McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289, 291-300 (1980); R. Bork, *The Antitrust Paradox*, 144-59 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 697-704 (1975).

ally incurring substantial losses would be rational and likely if, and only if, a government bailout, in the form of a JOA, would be available if the predatory pricing scheme should fail. If Congress's basic policies are to be preserved, the NPA may not be interpreted to reward or encourage such behavior.⁹

The fact that the NPA expressly prohibits predatory pricing by newspapers operating under a lawful JOA further bolsters the proposition that the Act should not be interpreted to reward such schemes. 15 U.S.C. § 1803(c) (Act not to "be construed to exempt from any antitrust law any predatory pricing"). Even the panel majority recognized the legitimate concern that, after the Attorney General's interpretation of the NPA, "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing." Pet. App. 189a (emphasis added). The panel majority, however, held that the Attorney General had discretion to adopt this interpretation of the Act, without regard to its impact on competition.

The seriousness of the deviation of the Attorney General's interpretation is highlighted by the evidence that the prospect of obtaining a JOA in Detroit was an important factor in the decision of both papers to cut prices in the first place. As the Administrative Law Judge concluded,

[t]he losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expecta-

⁹The ALJ's finding, that the applicants had *not* demonstrated that the News is likely to maintain its low prices even if the JOA is denied, reinforces this point. Pet. App. 92a. Although the Attorney General found that the News was likely to maintain its low prices (Pet. App. 143a), his only support for this finding was the ALJ's Finding of Fact No. 107 (Pet. App. 143a), where Judge Needelman reached a directly contrary conclusion, namely that the applicants had not carried their burden of proof on this issue. Pet. App. 92a.

tion that failure to achieve these goals would result in favorable consideration of a JOA application.

Pet. App. 132a-33a. Judge Needelman supported this conclusion by finding that the Free Press had rejected several opportunities to escape the competitive struggle because it believed that it could win dominance in the Detroit market, with the JOA as a cushion to fall back on if it failed. Pet. App. 17a-19a. It is also significant that Gannett purchased the News only after confirming that Knight-Ridder was willing to consider a JOA, and the two newspapers signed the joint operating agreement just two months after Gannett had formally acquired the News. Pet. App. 29a; J.A. 85. As described by Assistant Attorney General Ginsburg, "Gannett and Knight-Ridder demonstrated an almost unseemly haste in considering the possibility of a JOA even before Gannett had successfully bid for the Evening News Association." J.A. 89.

In *Hearst*, *supra*, 704 F.2d at 478, the Ninth Circuit upheld Attorney General Smith's interpretation of the NPA, which was designed "to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA." Yet, as Chief Judge Wald lamented, the Attorney General's decision in this case "will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Pet. App. 210a (emphasis in original). For all of these reasons, the Attorney General's decision approving the Detroit JOA is contrary to the Newspaper Preservation Act.

II. CHEVRON DOES NOT PROVIDE A BASIS FOR UPHOLDING THE ATTORNEY GENERAL'S DECISION.

Until the decision of the panel below, it had been universally accepted that the Justice Department and the courts are required to construe the Newspaper Preservation Act narrowly because it is an exemption from the antitrust laws. In the only other case where a court construed the exemption, the Ninth Circuit expressly held that this rule of statutory construction applies to the NPA. *Committee for an Independent P-I v. Hearst Corp.*, *supra*, 704 F.2d at 478. In *Hearst*, the court was restating the position of then-Attorney General William French Smith, who had noted, in the decision under review there, that "exemptions from the antitrust laws," such as the NPA, "must be narrowly construed." See 47 Fed. Reg. 26,472, 26,473 (June 18, 1982). Similarly, the Assistant Attorney General for Antitrust had issued the same declaration in his report evaluating the application for a JOA in Chattanooga, which Attorney General Benjamin Civiletti incorporated into his decision. Report of the Assistant Attorney General, Public File No. 44-03-25-5, p. 8 n.1 (May 19, 1980); 45 Fed. Reg. 58,733 (September 4, 1980) (Attorney General Civiletti's order).

During the consideration of the Free Press and News's application for a JOA, there was never any indication that the Justice Department intended to disavow this rule of construction. In his initial report on the application, Assistant Attorney General Ginsburg stated, as if the issue were beyond dispute, that "[a]s with all exemptions to the antitrust laws, exemptions for joint arrangements under the Act must be narrowly construed." J.A. 38, citing *Group Life and Health Insurance v. Royal Drug Co.*, *supra*, and *Hearst*, *supra*. In its Post-Hearing Brief to the Attorney General, the Antitrust Division reiterated the importance of the rule. J.A. 100. Although Attorney General Meese did

not mention the rule in his Decision and Order (Pet. App. 136a-48a), he never indicated that he intended to reject it, or that he believed he would have had the authority to do so. Similarly, in the briefs in the court of appeals, the Justice Department and the newspapers never argued that the Attorney General had any such authority.

Nevertheless, the panel majority found that the Attorney General was excused from applying the rule. It held that *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes." Pet. App. 180a (emphasis in original). As applied to the NPA, the panel majority's decision is wrong.

A. *Chevron* Did Not Alter the Applicability of the Rule That Exemptions From the Antitrust Laws Must Be Narrowly Construed.

In *Chevron*, this Court provided guidance to lower courts reviewing the interpretation and implementation of regulatory statutes by administrative agencies. *Chevron* involved a challenge to the Environmental Protection Agency's regulation defining the term "stationary source" in the Clean Air Act. The regulation permitted the states to adopt a plant-wide definition of stationary source rather than restricting the definition to each device that emitted pollution within a plant.

Both this Court and the lower court held that neither the Clean Air Act nor its legislative history clearly defined the statutory term at issue. Finding that Congress had assigned to EPA the function of implementing this technical statute and that the ultimate decision depended on how one balanced the Act's competing policies ("progress in reducing air pollution [and] economic growth"), the Court held that the Congress had dele-

gated that task to the agency. 467 U.S. at 866. In these circumstances, this Court ruled that any reasonable construction of the statute must be upheld.

Chevron does not give agencies the latitude to ignore established rules of statutory construction, as the panel majority concluded. To the contrary, *Chevron* explicitly held that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, supra*, 467 U.S. at 843 n.9 (emphasis supplied). Moreover, since *Chevron*, this Court has frequently used rules of statutory construction in reviewing agencies' interpretations of statutes. See, e.g., *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988) (statutes to be construed as not conferring implied authority to issue retroactive regulations). Insofar as we have been able to determine, the Court has never suggested that *Chevron* modifies these traditional rules of statutory construction.¹⁰

The panel majority never came to grips with the importance of the application of the antitrust rule. That application is firmly embedded in our jurisprudence, see, e.g., *Group Life & Health*

¹⁰In addition to *Bowen*, see also *Amoco Production Co. v. Gambell*, 480 U.S. 531, 555 (1987) (reference to "familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians," although rule not applicable in that case); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (reference to "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," although it was unnecessary to rely on the rule in reversing the agency); *Bowen v. American Hospital Association*, 476 U.S. 610, 644 n.33 (1986) (reference to the rule of strict construction of statutes in derogation of sovereignty); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("where possible, provisions of a statute should be read so as not to create a conflict"); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning").

Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979), as this Court has confirmed since *Chevron. Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986) (“exemptions from the antitrust laws are strictly construed and strongly disfavored”). No court had previously suggested that an administrative agency or a court has the authority to ignore it under *Chevron* or any other rationale.¹¹

The Court faced an analogous issue in *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trade Council*, 108 S. Ct. 1392 (1988), where the National Labor Relations Board sought enforcement of an order prohibiting a union from distributing handbills urging consumers to boycott a shopping mall. In response to the NLRB’s argument that its interpretation of the statute was entitled to deference under *Chevron*, this Court held that any *Chevron* deference was overridden by “[a]nother rule of statutory construction” — the rule that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* at 1397. While the antitrust rule at issue in this case may not have the stature of the rule invoked in *DeBartolo*, it too is solidly entrenched in this Court’s jurisprudence, and it should also override any deference that would otherwise be required by *Chevron*.

The court of appeals did leave some room for the use of canons of statutory construction. It held that canons could be employed to demonstrate that Congress had a “specific intent on the issue in question.” Pet. App. 180a (emphasis in original). For example, according to the panel, the canon of *expressio unius est exclusio*

¹¹See also, e.g., *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190-91 (2d Cir. 1987) (court’s review of agency action guided by both the rule requiring strict construction of antitrust exemptions and *Chevron*).

alterius might be used to demonstrate that in a statute banning the importation of apples, oranges, and bananas, Congress did not intend to ban the import of grapefruits. Pet. App. 180a-81a. However, the panel claimed that *Chevron* prohibited the courts from applying the canon here, even if such an application would have led to the conclusion that the Attorney General had construed the antitrust exemption too broadly and thereby had violated the Newspaper Preservation Act. Nothing in *Chevron* or its progeny supports this result, particularly since Congress intended that the NPA be narrowly construed. See pp. 17-20, *supra*.

Even if the NPA did not directly address the issue raised in this case, this Court made it clear in *Federal Maritime Commission v. Seatrain*, 411 U.S. 726 (1973), that the rule should still be used in determining whether the agency’s interpretation of an antitrust exemption is reasonable and supportable. In *Seatrain*, the Court reviewed a decision of the Federal Maritime Commission, that a contract involving the purchase of one shipping company by another was an “agreement” within the meaning of section 15 of the Shipping Act of 1916, 46 U.S.C. § 814, and thus subject to the FMC’s approval and grant of antitrust immunity. This Court rejected the Commission’s interpretation, even though “the statutory language neither clearly embraces nor clearly excludes discrete merger or acquisition-of-assets agreements.” *Id.* at 731. According to the Court, a ruling sustaining the Commission’s “broad reading of [the statute] would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed.” *Id.* at 733.

The panel’s analysis is flatly inconsistent with *Seatrain*. Indeed, applying the panel’s method of statutory construction would have led to the opposite result there since this Court relied on the rule to reverse the Commission’s expansive construction of the Shipping Act. The panel’s error is underscored by this Court’s citation to the *Seatrain* decision in *Chevron*. 467 U.S. at 843 n.9.

B. The Court Should Not Defer to the Attorney General's Construction of the NPA.

Even prior to *Chevron*, the principle that agencies' interpretations and applications of statutes were entitled to deference was well-established. *See, e.g., NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *see also Chevron, supra*, 467 U.S. at 843 n.9. However, the lower courts have interpreted *Chevron* as requiring them to give extremely broad latitude to administrative agencies' interpretations of statutes. This is what the panel majority referred to as "*Chevron's* restraining leash." Pet. App. 200a.

We have argued above that this Court's precedents, including *Chevron*, required the court of appeals to apply the antitrust rule to the NPA and that the NPA directly addresses the issue before the Court. However, even if the Court finds that the NPA does not answer the specific issue before the Court, there are four reasons why deference to the Attorney General is not appropriate here.

First, in contrast to the Clean Air Act and other complex regulatory statutes administered by agencies, the antitrust laws have historically been interpreted and enforced by the courts. As this Court stated in *United States v. First City National Bank*, 386 U.S. 361, 367 (1967),

Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure.

Although the Bank Merger Act required *de novo* review of the Comptroller's decisions, the Court indicated that Congress had codified the standard of judicial review that had previously been applicable. *Id.* ("We have found no indication that Congress

designed judicial review differently under the 1966 Act than had earlier obtained."'). Addressing the argument that Congress had intended it to apply a more relaxed standard of review, this Court concluded that it would have had "to assume that Congress made a revolutionary innovation" to shift the standard of review to the test that is traditionally used in reviewing administrative actions. *Id.* at 368. Finally, in its post-*Chevron* construction of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which does not provide for *de novo* review, this Court adopted a similar approach, holding that, although the FTC is entitled to "some deference," "identification of governing legal standards and their application to the facts found [are] for the courts to resolve." *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

The implications of the deference question go far beyond the Newspaper Preservation Act since there are numerous other exemptions from the antitrust laws that administrative agencies are charged with interpreting and enforcing.¹² To interpret *Chevron* as giving agencies an almost unreviewable ability to expand those exemptions would upset the settled expectations of Congress when it enacted those laws.

Second, the NPA and its legislative history demonstrate that Congress expected the courts to construe the Act. Since *Chevron*

¹²*See, e.g., Fishers' Coop Marketing Act*, 15 U.S.C. §§ 521, 522 (Secretary of Commerce may order associations to "cease and desist" if he finds that the "association monopolizes or restrains trade . . . to such an extent that the price of any aquatic product is unduly enhanced"); *Export Trading Company Act*, 15 U.S.C. §§ 4001 *et seq.* (Secretary of Commerce may exempt persons in export trade from antitrust laws upon showing that there will be no "substantial lessening of competition" and no "unfair methods of competition"); *Interstate Commerce Act*, 49 U.S.C. §§ 11343, 11344 (ICC may approve certain acquisitions and mergers taking into account the "effect . . . on the adequacy of transportation" and whether it would have an "adverse effect on competition").

is founded on the general assumption that Congress intended to grant regulatory agencies broad latitude to fill in gaps in their statutes, an identifiable congressional expectation that the courts would take the lead in interpreting the NPA precludes giving the Attorney General deference otherwise accorded administrative agencies under *Chevron*.

The Senate Committee Report, as well as the debates and statements made at the hearings on the NPA, establish that Congress assumed that the courts would play the principal role in interpreting the definition of "failing newspaper" and in particular the provision requiring proof of "probable danger of financial failure." As we have discussed above, the definition of "failing newspaper" was taken from the Bank Merger Act. In its Report, the Senate Judiciary Committee stated that the phrase had "been the subject of a Supreme Court opinion in *U.S. v. Third National Bank*." S. Rep. No. 91-535, *supra*, p. 2. As Representative Kastenmeier, the House floor leader, described the term:

It comes out of the Bank Merger Act. *It is understood by the courts in the field, and happens to be a term that is well known.*

116 Cong. Rec. 23,146 (1970) (emphasis added). Numerous other statements made during the course of legislative consideration of the bill also demonstrate that Congress assumed that the courts, rather than the Attorney General, would have the principal responsibility to interpret the NPA.¹³

¹³S. Rep. No. 535, *supra*, p. 4 ("In applying this definition *the Court* should consider the impact of competition on newspapers as it determines whether a paper is likely to disappear as a competitive factor.") (emphasis added); *id.* at 5 ("The language of section 3(5) is similar to other general standards which *the courts* apply in other areas of antitrust law.") (emphasis added); 1969 House Hearings, *supra*, p. 97 (statement of Rep. Railsback that "I take
(footnote continued)

A comparison of the NPA with the version of the bill initially introduced in the Senate also indicates that Congress assumed that the courts would interpret the Act. Since the NPA does not provide for review by the Attorney General of pre-1970 JOAs, the courts have the sole responsibility for resolving any legal issue pertaining to such agreements. *See* 15 U.S.C. § 1803(a). The bill approved by the Senate Judiciary Committee contained an identical standard for pre-1970 and post-1970 JOAs, but newspapers seeking to operate under a JOA after 1970 would have been required to obtain approval from the Attorney General. S. 1520, 91st Cong., 1st Sess. §§ 3(5), 4(a), 4(b) (1969). If that bill had been enacted into law, the Act would not have been interpreted to mean that the Justice Department could adopt one interpretation of that standard for post-1970 JOAs, while the courts could adopt another interpretation for pre-1970 agreements. *Cf. Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (*Chevron* deference not applicable where Congress has entrusted Federal Trade Commission and Justice Department with responsibility under section 7A(h) of the Clayton Act because of possibility of conflicting interpretations). Although Congress ultimately adopted two distinct standards, it did not alter the respective roles of the Attorney General and the courts. Therefore, the sequence

it that *the courts* have defined what constitutes a failing newspaper?") (emphasis added); *id.* at 110 (statement of Morris J. Levin, Counsel for Tucson Newspapers, Inc. that "[t]o argue that the proposed language of the definition is too broad or generally fails to take into consideration the fact that *the courts* have had little difficulty in interpreting similar language in the antitrust laws") (emphasis added); *see also* 116 Cong. Rec. 2006 (1970) (statement of Sen. Hruska indicating that the failing newspaper standard would be interpreted by "a reviewing court"); *The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess., p. 302 (1979) (statement of Senator Hart that "we don't know how a *court* will interpret any piece of legislation") (emphasis added).

of bills that Congress considered supports the argument that it did not intend the courts to defer to the Justice Department in construing the NPA.

Third, to the extent that the deference required by *Chevron* depends on the complexity of the statute or the expertise of the agency, it has little or no applicability here. See *Bowen v. American Hospital Association*, *supra*, 476 U.S. at 642 n.30. The NPA is not complex, and in contrast to the Clean Air Act and many of the other statutes to which *Chevron* has been applied, the Attorney General has no technical expertise in interpreting it. The basic antitrust laws, such as the Sherman and Clayton Acts, are typically applied and interpreted in the first instance by the courts. Moreover, the expertise in this area resides in the Antitrust Division of the Department of Justice, which disagreed with the Attorney General as to whether the application at issue in this case qualified under the NPA. Thus, the consideration of expertise does not support granting extra deference to the Attorney General's decision in this case.

Fourth, to the extent that *Chevron* depends on the principle that Congress intended executive branch agencies to resolve the competing policies underlying regulatory statutes, it has less applicability here because Congress largely resolved those policies in the statute itself. In the NPA's declaration of policy, Congress identified the two relevant policy considerations: the "public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States"; and the interest in "preserv[ing] the publication of newspapers." 15 U.S.C. § 1801. This statement of policy demonstrates that Congress preferred competing newspapers and that joint operation was to be permitted where the alternative was likely to be the loss of one newspaper. Therefore, the Act prohibits the Attorney General from granting the exemption unless one of the newspapers is in "probable danger of financial failure."

In summary, the Attorney General's decision must be judged against the statute, its structure, its legislative history, and the rule that exceptions from the antitrust laws are to be narrowly construed. Whatever deference may be appropriate, the Attorney General is not entitled to adopt a broad construction of the Act that is inconsistent with both the rule of construction and the underlying purposes of the Act itself. —

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the Decision and Order of the Attorney General approving the JOA should be set aside.

Respectfully submitted,

William B. Schultz
(Counsel of Record)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

June 30, 1989

BEST AVAILABLE COPY

QUESTIONS PRESENTED AND OTHER MATTERS

Respondent The Detroit News, Inc. refers to, and defers to, the Brief of Respondent the Detroit Free Press, Incorporated for the questions presented and other matters called for by Rule 34 (a), (b), (d), (e) and (f) of the Supreme Court Rules. For its statement required by Rule 28.1, The Detroit News, Inc. refers to the Rule 28.1 Statement included in its brief in opposition to the petition for certiorari.

TABLE OF CONTENTS

	Page	
QUESTIONS PRESENTED AND OTHER MAT- TERS	i	
TABLE OF AUTHORITIES	v	
STATEMENT	1	
SUMMARY OF ARGUMENT	3	
ARGUMENT	5	
I. THE SURVIVAL OF COMMERCIAL COMPE- TITION BETWEEN METROPOLITAN DAILY NEWSPAPERS HAS FOR DECADES BEEN THREATENED BY THE UNIQUE ECONOM- ICS OF THE NEWSPAPER INDUSTRY, NOT BY THE NEWSPAPER PRESERVATION ACT, THE DECISION OF THE ATTORNEY GENERAL, NOR THE CONDUCT OF THE APPLICANTS		5
A. The Unique Economics of the Newspaper Industry		5
1. The Interrelationship Between the Mar- kets for Circulation and Advertising		7
2. Economies of Scale		10
3. Increased Competition with Other Media..		12
B. The Consequences of the Unique Economics of the Newspaper Business to Newspapers Facing Direct Competition		13
C. Congressional Reaction—Passage of the NPA		18
D. Events Since the Passage of the NPA in 1970		19

TABLE OF CONTENTS—Continued

	Page
II. NEWSPAPER COMPETITION IN DETROIT..	20
A. The News and Free Press Fight for Survival	20
B. "Win-Win"	27
III. COMPETITION IN LITTLE ROCK	33
CONCLUSION	38
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
<i>Albrecht v. The Herald Co.</i> , 390 U.S. 145 (1968)	15, 16
<i>Auburn News Co. v. Providence Journal Co.</i> , 659 F.2d 273 (1st Cir. 1981), cert. denied, 455 U.S. 921 (1982)	16
<i>Cargill, Inc. v. Monfort of Colorado, Inc.</i> , 479 U.S. 104 (1986)	33
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	passim
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983)	19
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	33
<i>Northwest Publications, Inc. v. Crumb</i> , 752 F.2d 473 (9th Cir. 1985)	16
<i>In the Matter of Times Mirror Co.</i> , 100 FTC 252 (1982)	17
<i>Times-Picayune Publishing Co. v. United States</i> , 345 U.S. 594 (1953)	6
Statute:	
Newspaper Preservation Act,	
15 U.S.C. § 1801	3
15 U.S.C. § 1802 (5)	3
Legislative Authorities:	
H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970)	6, 18
S. Rep. No. 535, 91st Cong., 1st Sess. (1969)	3, 6, 18, 19
<i>Newspaper Preservation Act: Hearings on H.R. 279 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary</i> , 91st Cong., 1st Sess. (1969)	passim
<i>Newspaper Preservation Act: Hearings on H.R. 19123 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary</i> , 90th Cong., 2d Sess. (1968)	12, 19
<i>The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary</i> , 90th Cong., 1st Sess. (1968)	passim

TABLE OF AUTHORITIES—Continued

	Page
116 Cong. Rec. 1785 (1970)	9, 12
116 Cong. Rec. 1786 (1970)	2, 18
116 Cong. Rec. 1787 (1970)	4, 19, 38
116 Cong. Rec. 2006 (1970)	10
116 Cong. Rec. 23,156 (1970)	18
116 Cong. Rec. 23,166 (1970)	9
116 Cong. Rec. 23,168 (1970)	7, 9, 13, 15
134 Cong. Rec. S8777 (daily ed. June 29, 1988)	15
Other Authorities:	
3 P. Areeda & D. Turner, <i>Antitrust Law</i> (1978)	34
Blair & Kaserman, <i>The Albrecht Rule and Consumer Welfare: An Economic Analysis</i> , 33 U. Fla. L. Rev. 461 (1981)	16
Blair & Schafer, <i>Evolutionary Models of Legal Change and the Albrecht Rule</i> , 32 Antitrust Bull. 989 (1987)	16
<i>Buffalo Courier-Express faces Sept. 19 closing</i> , Editor & Publisher, Sept. 11, 1982	20
Ferguson, <i>Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition</i> , 26 J. Law & Econ. 635 (1983)	8
Hovenkamp, <i>Vertical Integration by the Newspaper Monopolist</i> , 69 Iowa L. Rev. 451 (1984) ..	16
Note, <i>Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head</i> , 38 U. Fla. L. Rev. 479 (1986)	15, 16
Note, <i>Local Monopoly in the Daily Newspaper Industry</i> , 61 Yale L.J. 948 (1952)	14, 17
S. Oppenheim & C. Shields, <i>Newspapers and the Antitrust Laws</i> (1981)	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
 v. *Petitioners,*

DICK THORNBURGH,
 UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
 for the District of Columbia Circuit

BRIEF FOR RESPONDENT
 THE DETROIT NEWS, INC.

STATEMENT

In this proceeding, the Detroit Free Press (the "Free Press") is fighting for its survival. It has concluded, and the record before the Attorney General demonstrates, that its only chance for survival is implementation of the joint newspaper operating arrangement which the Attorney General approved under the Newspaper Preservation Act ("NPA") in the decision attacked by petitioners in this action.

The Detroit News (the "News"), however, finds itself in what its Chairman has characterized as a "win-win" situation." J.A. 225, 228-29. If the decisions of the Attorney General, the District Court and the Court of Appeals were reversed, and the application under the

Newspaper Preservation Act ultimately denied, the News would find itself as the only metropolitan daily and Sunday newspaper published in the Detroit market. On the other hand, the News is contractually obligated to "support the [JOA] application fully in every reasonable respect and shall cooperate in and coordinate with respect to the taking of all appropriate steps to secure the approval of the application" (JOA agreement ¶ 6-4, NX (Physical) (C))¹ and it has done so. In light of the drastically different consequences to the two newspapers should the Attorney General's decision be vacated, the News has been reluctant to make any statement that might jeopardize the position of the Free Press. For example, the News did not present oral argument in the Court of Appeals and does not intend to do so here. The briefs filed by the News in the Court of Appeals and in this Court have essentially been limited to correcting the factual inaccuracies contained in the filings of *amicus* Little Rock Newspapers, Inc. ("LRNI"), which competes with the News' affiliate newspaper in Little Rock, the Arkansas Gazette.

The News has decided to file this brief in response to petitioners' brief and the brief of *amicus* LRNI for two reasons: (1) as significant members of the newspaper industry, the News and its parent Gannett Co., Inc. are interested in assuring that the Newspaper Preservation Act is correctly interpreted and that this Court has a full understanding of what Congress, in enacting the NPA, referred to as the "unique economic forces" of the newspaper business (116 Cong. Rec. 1786 (1970) (statement of Sen. Bennett)); and (2) petitioners and LRNI mischaracterize the conduct of the News and the Arkan-

¹ The following exhibits referred to in this brief were received into evidence on July 17, 1987: NX Physical (C); NX 1H; NX 2X; NX 613A-B; J.A. 565; J.A. 589-90. The following exhibits were received into evidence on August 17, 1987: JX 1; JX 2; JX 12; JX 16; JX 19. AX 582 was received into evidence on August 18, 1987.

sas Gazette, ignore the economic realities of the newspaper industry, and seek to emasculate the Newspaper Preservation Act.

SUMMARY OF ARGUMENT

Congress recognized that the "economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses." S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Congress also understood that joint newspaper operating arrangements provided a means to preserve separate editorial voices in metropolitan areas in which those economic forces placed one of the competing newspapers in economic distress. After this Court applied the traditional "failing company" test to a joint operating agreement in Tucson, Arizona, and declared it to be unlawful because the weaker newspaper had not proved that it had "faced the grave probability of a business failure" nor that it grasped at the JOA as the "last straw" (*Citizen Publishing Co. v. United States*, 394 U.S. 131, 137 (1969)), Congress enacted the Newspaper Preservation Act to permit newspapers to enter into JOAs before the "narrow" failing company standard had been met. Congress "declared [it] to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement . . . is hereafter effected in accordance with the provisions of this Act." 15 U.S.C. § 1801. Finally, Congress delegated to the Attorney General of the United States the determination of whether a particular newspaper met the Act's new, less stringent, standard of "probable danger of financial failure." 15 U.S.C. § 1802 (5).

It is impossible to read the legislative history of the NPA and conclude, as petitioners would have this Court conclude, that the purpose of the Newspaper Preservation Act was to erect barriers to newspapers entering into

joint operating arrangements. The express purpose of the NPA was to remove the significant barriers to future JOAs created by *Citizen Publishing*.

Newspaper publishers, long before the NPA was enacted in 1970, had recognized that the unique economics of the newspaper industry made it unlikely that smaller newspapers would survive head-to-head competition with a larger newspaper with greater circulation. Those economic realities have long given newspapers a powerful incentive to price their circulation and advertising to ensure that they become the leading, or dominant, newspaper in their market.

To suggest, as do petitioners, that it is the Attorney General's decision in this case that will lead newspaper publishers in the few remaining multiple newspaper cities to compete aggressively for circulation and advertising market shares, is to assume that such publishers are ignorant of the economic realities of their own business. They are not. Newspaper publishers have recognized for decades that being the second newspaper in a two-newspaper city is a condition which is almost always fatal. The series of great newspaper wars, or "price war conditions" (116 Cong. Rec. 1787 (1970)) can be explained by a recognition by newspaper publishers of the same economic forces that led Congress to pass the Newspaper Preservation Act, and by the desire of those newspaper publishers to compete aggressively for circulation and advertising market share to ensure their own "preservation."

ARGUMENT

I. THE SURVIVAL OF COMMERCIAL COMPETITION BETWEEN METROPOLITAN DAILY NEWSPAPERS HAS FOR DECADES BEEN THREATENED BY THE UNIQUE ECONOMICS OF THE NEWSPAPER INDUSTRY, NOT BY THE NEWSPAPER PRESERVATION ACT, THE DECISION OF THE ATTORNEY GENERAL, NOR THE CONDUCT OF THE APPLICANTS.

At various points in their briefs, petitioners and *amicus* LRNI suggest that the Newspaper Preservation Act, the Attorney General's decision in this proceeding, and the conduct of Gannett have imperiled continued commercial competition between metropolitan daily newspapers in the United States. These arguments ignore (1) the history of newspaper competition in the U.S. prior to the enactment of the NPA which saw the number of cities with competing daily newspapers decline from 552 in 1920 to 45 in 1968 (*Newspaper Preservation Act: Hearings on H.R. 279 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 128 (1969)* [hereinafter "*Hearings on H.R. 279*"] and led Congress to enact the NPA; (2) the economic collapse of the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express, the Baltimore News-American and other major metropolitan newspapers after the NPA was passed and before the Attorney General's decision in this proceeding; and (3) the history of newspaper competition in Detroit before Gannett acquired the News in February 1986, and in Little Rock before LRNI's conduct forced the owner of the Gazette to sell it to Gannett in late 1986.

A. The Unique Economics of the Newspaper Industry

When it passed the Newspaper Preservation Act, Congress expressly recognized that "the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other busi-

nesses" and that "when a newspaper is failing, it is harder to reverse the process" S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Accordingly, in response to this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), applying the traditional "failing company" doctrine to invalidate a newspaper joint operating arrangement, Congress passed the NPA "to establish a less stringent test" for approval of joint operating agreements than that applied in *Citizen Publishing*. S. Rep. No. 535, *supra*, at 4. See also H.R. Rep. No. 1193, 91st Cong., 2d Sess. 10, reprinted in 1970 U.S. Code Cong. & Admin. News 3547, 3555. The unique economics of the newspaper business which led to passage of the NPA were described in the committee reports, the floor debates, the extensive hearings conducted on the Act and predecessor bills, and in the economic literature.

The results of those economic forces were summarized in the statement of the spokesman for the sponsors that was adopted in the House Report:

The history of newspaper economics demonstrates that although the total number of newspapers in operation has not changed radically over the years, nevertheless, economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities.

H.R. No. 1193, *supra*, at 3, reprinted in 1970 U.S. Code Cong. & Admin. News at 3548 (quoting statement of Rep. Matsunaga). In 1910, according to the report, almost 60% of U.S. communities with a daily newspaper had two or more. But by 1968, over 95% of the newspaper cities had only one newspaper owner. *Id.* at 3-4, reprinted in 1970 U.S. Code Cong. & Admin. News at 3548. This Court had recognized as early as 1953 that "daily newspaper competition within individual cities has grown nearly extinct." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 603 (1953).

The reasons for this near extinction of multiple newspaper cities occupied hundreds of pages of hearing testimony during the deliberations on the NPA, but three of the most important are (1) the unique relationship between circulation and advertising—the two different, but interrelated, markets that newspapers serve; (2) important economies of scale which give a large paper with greater circulation an advantage over a smaller competitor; and (3) increased competition from other media, including network, local and cable television, FM radio, direct mail, weekly newspapers, suburban newspapers, shoppers, billboards, local magazines and business journals and special interest publications.

1. *The Interrelationship Between the Markets for Circulation and Advertising*

The mortality rate for second newspapers can, in part, be traced to the fact that newspapers get revenues from two different, but highly interdependent, sources: (1) the sale of the newspapers to readers, and (2) the sale of space to advertisers who wish to have their messages delivered to readers of the newspaper. See *Hearings on H.R. 279*, at 16; *The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 567-68 (1968) [hereinafter "*Hearings on S. 1312*"]; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 543; J.A. 510-11; NX 800 Z-21-23 ¶¶ 77-80 (Rosse). An economist testifying at the Senate hearings on the NPA put it this way:

Physically a newspaper consists of newsprint and ink, but from an economic standpoint, it is best described as a combination of services—the furnishing of news and the furnishing of an advertising vehicle. While most of us seek information from a newspaper's advertising columns as well as its news columns, from the newspaper's viewpoint these are two essentially

separate markets. Subscribers will not pay the full cost of gathering the news and printing it, and advertisers pay a good deal more than their share of the total costs—to the point where in recent years 70 to 75 percent of the revenue of the average newspaper derives from advertising. Such a common method of pricing as adding a markup to cost is not, therefore, applicable to the sale of newspaper services. . . . [N]ewspaper pricing has no precise parallel in other industries. . . . [A]nother unique aspect of the newspaper business [is that] success in selling advertising is very largely dependent on success in selling news. In evaluating a newspaper's success in selling news, advertisers are interested not only in how many readers a newspaper has but who its readers are, where they live, and their economic status.

Hearings on S. 1312, at 2588 (statement of Simon N. Whitney, Professor of Economics, New York University).

That advertisers prefer a newspaper that will deliver their messages to the greatest number of potential buyers of the advertisers' goods or services is commonly understood. *Hearings on H.R. 279*, at 10-11; *Hearings on S. 1312*, at 545. The less obvious economic characteristic of the newspaper business is that readers of a newspaper tend to prefer the newspaper that has more, and in some ways better, advertising. J.A. 543; NX 800 Z-22 ¶ 80 (Rosse). See also *Hearings on S. 1312*, at 545; Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition*, 26 J. Law & Econ. 635, 637 (1983). Thus, grocery shoppers generally prefer the paper with the most discount food coupons; home buyers buy the paper with the largest local real estate classified advertising section; and job seekers buy the paper with the largest help wanted sections. J.A. 544.

The effect on circulation of a drop in the amount or quality of advertising is exacerbated when one recognizes that a decrease in advertising revenues correspondingly

diminishes the funds available for gathering and printing the news and other editorial materials. As put by the sponsors of the NPA,

[o]nce a larger newspaper succeeds in attracting advertisers away from its smaller rival (or rivals, if any), the latter is forced to compensate for the loss of revenue by cutting back its news and editorial departments. The consequence is then a further decline in circulation with the almost irreversible downward spiral ending in a business failure.

Hearings on H.R. 279, at 11 (statement of the sponsors of the Newspaper Preservation Act).

The potential for a "downward spiral" caused, in part, by the interrelationship of the circulation and advertising markets was described at the Senate hearings by the publisher of the San Francisco Chronicle:

Circulation, as we know, attracts advertising. By the same token, advertising, directly or indirectly, affects circulation. It attracts circulation directly because the average newspaper reader finds much of interest to him in the advertising which the newspaper contains. It affects circulation indirectly because a sustained drop in advertising lineage generally results in a reduction in editorial lineage. This results, in turn, in a newspaper less attractive to the reader, with consequent further loss in circulation. This spiraling, once commenced, accelerates rapidly and reversal of the trend is always difficult and sometimes impossible. It is almost always a fatal disease.

Hearings on S. 1312, at 545 (statement of Charles Thieriot, President of the Chronicle Publishing Co. and Editor and Publisher of the San Francisco Chronicle). See also 116 Cong. Rec. 1785 (1970) (statement of Sen. Inouye); 116 Cong. Rec. 23,166 (1970) (statement of Rep. Halpern); 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio).

The fatal consequences of this "downward spiral" give newspaper publishers a powerful incentive to price their

advertising and circulation in such a way as to avoid entering the downward spiral. Tr. 2813-14 (Rosse); Tr. 2192, 2245-47 (Morton). See also S. Oppenheim & C. Shields, *Newspapers and the Antitrust Laws* 6 (1981). A newspaper may try to avoid the downward spiral by spending to improve its product and by making pricing decisions designed to make its products attractive to readers and advertisers. These efforts can take the form of heavy promotion expenses and decreased revenues through discounted circulation and advertising prices. Such efforts can be extremely expensive. While such expenditures may have the effect of postponing the downward trends in circulation and advertising for a smaller newspaper, the cost of doing so will almost certainly be operating losses that cannot be expected to be funded indefinitely by the newspaper's owner. "[E]ven a multi-millionaire corporation, whether a chain or an individual, cannot constantly pour money into a failing newspaper in a given city" 116 Cong. Rec. 2006 (1970) (statement of Sen. Hruska).

2. Economies of Scale

Economies of scale also help explain the trend toward single newspaper cities:

Underlying the trend toward fewer commercially competing local dailies is the basic principle of the economy of large-scale enterprise. Once a newspaper is set into type and the plates are put on the press, the cost of production per copy goes down as circulation goes up.

Hearings on H.R. 279, at 121 (statement of Raymond B. Nixon, Professor of Journalism, University of Minnesota). See also *Hearings on S. 1312*, at 2589.

The costs of producing the first copy of a newspaper include gathering the news and paying for reporters, correspondents or wire services; editing the news; preparing or purchasing other editorial features such as

columns and comics; composing or setting up the newspaper; preparing the plates, and purchasing the printing press and other production equipment. NX 800 L ¶ 15 (Rosse). These "first copy" costs are incurred whether the newspaper prints 10,000 copies or 1,000,000. *Id.* Accordingly, the cost per copy is lower for the newspaper with higher circulation. *Hearings on S. 1312*, at 2589; *Hearings on H.R. 279*, at 121. By the same token, since the costs of delivering the newspaper are essentially the same whether the newspaper is ten pages long or one hundred, the distribution cost per page or per inch of advertising is significantly lower for a larger paper. NX 800 L ¶ 16 (Rosse). Accordingly, when two newspapers compete in the same market, the paper that is larger and has greater circulation enjoys an important competitive advantage through the operation of economies of scale. *Hearings on S. 1312*, at 2589; NX 800 O ¶ 20 (Rosse); AX 582.

A related phenomenon has to do with the advertising advantage enjoyed by a newspaper with greater circulation. As explained by Senator Hayden,

[a]dvertising rates are based on circulation. The paper with the greatest circulation has an advantage that builds on itself. The paper's marginal ad revenues exceed marginal circulation costs, and it can thus offer a lower milline rate (cost per line adjusted to circulation) and still earn more than its competitor.

Hearings on S. 1312, at 454 (Senate Bill 1312—"Failing Newspaper Act of 1967": An interview with Senator Carl Hayden of Arizona, Author of S. 1312). Thus, if two newspapers, one with 1,000 subscribers and the other with 2,000 subscribers, are competing for the same advertisers and they each charge \$1.00 per line for advertising—the cost for the advertiser to reach 1,000 subscribers with a line of advertising is \$1.00 in the smaller paper, but only 50 cents in the paper with larger circulation. That gives the paper with the larger relevant

circulation a substantial advantage in attracting advertisers. *Hearings on H.R. 279*, at 10-11; *Hearings on S. 1312*, at 454; 116 Cong. Rec. 1785 (1970) (statement of Sen. Inouye); J.A. 545-46.

3. Increased Competition with Other Media

While the unique relationship between circulation and advertising and the principles of economies of scale explain why Congress concluded that the economics of the newspaper industry make it more likely for newspapers to fail than other businesses when faced with competition, two newspapers in the same city do not compete in a vacuum. The witnesses at the congressional hearings explained that over the years competing newspapers began to face dramatically increased competition from other media for the attention of readers and, particularly, for the most important source of revenues—advertising. As explained by a principal sponsor of the NPA,

[n]ewspapers receive a considerable portion of their revenues from subscribing readers, but their primary source of income is from advertising. It is in the area of advertising that newspapers have encountered real problems. Competition from other advertising media, such as television, news magazines and suburban news publications, has taken its toll. Consequently, these newspapers have also suffered a steady decline in their share of the local and national advertising dollar.

Newspaper Preservation Act: Hearings on H.R. 19123 and Related Bills Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 38 (1968) [hereinafter "*Hearings on H.R. 19123*"] (statement of Rep. Matsunaga). Another sponsor testified that "newspapers have faced increasing competition for advertising revenue. First radio, then television, plus magazines, billboards, and 'throw away' papers have diverted revenues which formerly went to newspapers." *Hearings on H.R. 279*, at 41 (statement of Rep. Bel-

cher). See also *Hearings on S. 1312*, at 454; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 550, 552; NX 800 I ¶ 10 (Rosse). As a result of this competition from other media, newspapers' share of total advertising expenditures in the United States declined from 36 percent in 1950 to 26.4 percent in 1987. J.A. 551.

B. The Consequences of the Unique Economics of the Newspaper Business to Newspapers Facing Direct Competition

The consequences of the fundamental economic forces at play in the newspaper business were well known to both newspaper publishers and economists even before Congress enacted the Newspaper Preservation Act. Newspaper publishers had watched the number of cities with more than one commercially competitive newspaper dwindle from 552 in 1920 to 45 in 1968. *Hearings on H.R. 279*, at 128. The process by which the leading or dominant newspaper² in the competitive market uses the economic advantages given by its greater circulation to increase its lead over the junior paper was perhaps most succinctly stated by one newspaper publisher:

The strong grow stronger. The weak grow weaker. *Hearings on S. 1312*, at 568 (statement of Charles L. Gould, Publisher of the San Francisco Examiner).

The impact of the unique economics of the newspaper business upon competing newspapers was known long before the NPA. As early as 1952 an economic commentator pointed out that:

² It is important to note that the word "dominant" is used in the newspaper business, not in the antitrust sense, but as a term of art meaning the newspaper that leads in daily and Sunday circulation and in advertising share of the field. See, e.g., Tr. 1247 (Hall). A "second" or "junior" newspaper in a two-newspaper market is a newspaper that does not have those leads.

- Daily newspapers must seek economic success in two separate yet interdependent markets: reader circulation and advertising space sales. (959)
- The cost structure of daily press operations favors the daily with greater circulation. . . . [A]verage unit labor costs diminish directly with greater circulation. (974-75)
- Where two or more dailies serve a single community, the paper offering lower milline rates generally secures greater retail display linage. (982)
- [W]here local dailies compete in the community, publishers' low retail rates and special discounts to large retail buyers may be accentuated. (993)
- Where more than one paper serves a single community, the prevailing pattern of ad marketing probably curbs the success of the smaller-circulation daily. (998)
- [In] full-scale price competition with more efficient rivals, the smaller daily's cost handicap may lessen its chances for economic survival. (999)
- Typically, . . . the structure and organization of the circulation and advertising markets exert pressure on small competing papers to suspend publication, or to combine and achieve more efficient operations. (1001)
- Since newspaper size *is* efficiency, the smaller competing daily which could supply diversity of opinion and news presentation is consistently handicapped in its struggle for independent survival. (1007)

Note, *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948 (1952).

The practical business consequences to a newspaper publisher facing competition from another metropolitan daily newspaper in the same city were also obvious. To permit a newspaper's daily or Sunday circulation to fall

significantly behind that of the competitor was almost always fatal. *Hearings on H.R. 279*, at 11; *Hearings on S. 1312*, at 446, 545; 116 Cong. Rec. 23,168 (1970) (statement of Rep. Annunzio); J.A. 555-56; NX 700 Z-37 ¶¶ 103-05 (Morton); Tr. 1927 (Chapman). Accordingly, the task of a competing newspaper that trailed its competitors was clear. The second newspaper had to do everything possible to increase circulation so that it could increase advertising. J.A. 555-56. The appropriate course for the dominant newspaper was equally clear. It could take no action which would jeopardize its leads in circulation and advertising. Those conflicting objectives produced, in city after city, "great newspaper wars."

While the need to win the great newspaper war was felt in all decisions made at a competing newspaper, in no area was the economic necessity greater than in the area of pricing. In order to build circulation and attract advertising, newspapers have traditionally set the price of the newspaper to readers and subscribers at a level which often did not cover the costs of distributing the newspaper, much less the costs of creating the editorial product, buying the newsprint and ink, or producing the newspaper. *Hearings on S. 1312*, at 1771, 2588; J.A. 510-11; Tr. 972 (Hall).

The incentive for the newspaper to keep circulation prices low, even in cities with only one metropolitan newspaper, has been well documented. See Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head*, 38 U. Fla. L. Rev. 479, 481, 484, 486 (1986); 134 Cong. Rec. S8777 (daily ed. June 29, 1988) (statement of Sen. Leahy); Tr. 1724-25 (Neuharth); Tr. 2288 (Morton); J.A. 307-09. The issue reached this Court in *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968), a case involving a newspaper's imposition of a maximum resale price on its distributors. As Justice Stewart noted in dissent,

[b]ecause the major portion of the respondent's income derives from advertising rather than from sales to distributors, the respondent's self interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues.

Id. at 169 n.2.

The Court's decision in *Albrecht*, that maximum resale price agreements were *per se* unlawful, has spawned a substantial amount of litigation against newspapers. In much of that litigation, courts have articulated the newspaper publisher's need to keep circulation prices low, and the beneficial effect that need has on consumers. See *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985); *Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). By contrast, an independent distributor whose only interest is in the selling price of the newspaper and who does not share in the advertising revenues does not share the publisher's interest in low circulation prices. The individual distributor can increase profits by selling fewer papers at higher profits. The economic need for newspapers to keep circulation prices low has been noted by several economic commentators who have suggested that *Albrecht* should be overruled. See Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. Fla. L. Rev. 461 (1981); Blair & Schafer, *Evolutionary Models of Legal Change and the Albrecht Rule*, 32 Antitrust Bull. 989, 990 (1987); Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L. Rev. 451 (1984); Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head*, 38 U. Fla. L. Rev. 479 (1986).

The pricing behavior of other media with which newspapers compete underscores the need to keep newspaper prices low. Many of the other media "distribute" their

products free. For example, television, radio, shoppers, direct mail, billboards, and yellow pages do not charge their viewers or readers. By providing a product at the lowest possible price—i.e., free—these competing media are able to attract a large audience, thereby attracting large numbers of advertisers. Because newspapers derive the bulk of their revenue from advertising, it follows that they have the same need as the other media to keep prices as low as possible.

Since advertising revenues account for between 70% and 75% of a typical newspaper's revenues (*Hearings on S. 1312*, at 2588), and because the amount and quality of advertising help attract readers to a newspaper, advertising market share is necessarily a key battleground in the head-to-head competition between metropolitan daily newspapers. It has long been recognized that newspapers heavily discount advertising rates to large volume retail advertisers. *In the Matter of Times Mirror Co.*, 100 FTC 252, 256 (1982); Note, *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 980-81 (1952). One of the reasons for discounts to such retail advertisers is that their advertisements about sales, coupons and other information are valuable in attracting readers. Another, perhaps more subtle, reason for the emphasis on retail and classified market share is that success builds success. Because, for example, a person seeking to buy a home will purchase a newspaper with the most local real estate classified advertisements, an advertiser wishing to sell a home will seek to place the advertisement in the newspaper that will attract the most potential buyers. That dynamic has led at least one newspaper to offer free personal classified advertising. Opposition of The Detroit News, Inc. to the Motion of Little Rock Newspapers, Inc. for Leave to Appear as Amicus Curiae in the District Court, at 4.³ That same

³ That opposition has been filed with this Court as Exhibit F to Opposition of Respondent the Detroit Free Press, Incorporated to Petitioners' Motion for a Stay.

dynamic leads all newspapers in competitive markets to price their advertising to build market share as part of their efforts to ensure that they will win the competitive battle, and by so doing, survive.

C. Congressional Reaction—Passage of the NPA

Congress recognized that the fundamental economics of the newspaper business made the survival of competing metropolitan daily newspapers increasingly unlikely. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3-4, *reprinted in* U.S. Code Cong. & Admin. News at 3548. Congress also recognized that joint operating agreements provided a method of preserving editorial competition in the remaining cities with more than one newspaper. S. Rep. No. 535, *supra*, at 2-3; H.R. Rep. No. 1193, *supra*, at 3, *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3547. *See also* 116 Cong. Rec. 23,156 (1970) (statement of Rep. Buchanan). Finally, Congress recognized that application of the judicially created “failing company” doctrine to test the legality of newspaper joint operating arrangements simply would not work. S. Rep. No. 535, *supra*, at 4; H.R. Rep. No. 1193, *supra*, at 10, *reprinted in* 1970 U.S. Code Cong. & Admin. News at 3555; 116 Cong. Rec. 1786 (1970) (statement of Sen. Bennett). Under the “narrow scope” of the failing company doctrine as set forth in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969), the parties needed to show

that the resources of one company were so depleted and the prospect of rehabilitation so remote that “it faced the grave probability of a business failure.”

Id. at 137 (citations omitted). In addition, the parties were required to show that there was no other prospective purchaser. *Id.* at 138.

Congress concluded, however, that because of the economics of the newspaper business, by the time a newspaper could meet the standard of the failing company test, it

would be too late to save an editorial voice through a JOA. *See* S. Rep. No. 535, *supra*, at 6. By the time it became clear that a JOA was the “last straw” to save a failing newspaper, the dominant paper would have no incentive to enter into a JOA. *Hearings on H.R. 279*, at 12. Instead, it could either wait until the weaker newspaper shut down or, if the requirements of the failing company doctrine were met, it could buy the assets of the competing newspaper outright. As a sponsor of the NPA stated, “the court should be able to recognize the trend toward failure and not be required to wait until it is irreversible.” 116 Cong. Rec. 1787 (1970) (statement of Sen. Bennett).⁴ *See also Hearings on H.R. 279*, at 12; *Hearings on H.R. 19123*, at 40-41.

Accordingly, Congress passed the Newspaper Preservation Act and authorized the Attorney General to permit newspapers to enter into a JOA at a time *before* the “grave probability of a business failure” standard of *Citizen Publishing* had been met. *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). *See also Hearings on H.R. 19123*, at 40-41.

D. Events Since the Passage of the NPA in 1970

Since the passage of the NPA in 1970, the economics of the newspaper industry have not changed. They have worked themselves out in ever larger and larger metropolitan areas. While the failing newspapers in Cincinnati, Seattle, Anchorage, and Chattanooga were able to convince

⁴ Justice Douglas seemed to recognize this in *Citizen Publishing* when he said that “there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star. How otherwise is one to explain the Star’s willingness to enter into an agreement to share its profits with the Citizen.” 394 U.S. at 138. By implication, if the Citizen had waited until the “failing company” test had been met, the Star would have had no need to share profits with the Citizen.

their dominant competitors to enter into JOAs, the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express, and the Baltimore News-American were not so lucky. They shut down and ceased publication, in some cases after efforts to negotiate a JOA were rejected. Tr. 2365 (Morton). The reasons for the inability of those papers to enter into a JOA are varied. In some cases, the failing paper's doom was so clear that the dominant paper had no incentive to enter into the JOA. At least in one case the time and expense associated with a JOA application were cited as a reason. *Buffalo Courier-Express faces Sept. 19 closing*, Editor & Publisher, Sept. 11, 1982, at 13.

Consequently, by 1987, the number of cities with more than one competitive daily newspaper had dropped to 26. NX 800 H ¶ 9 (Rosse); J.A. 589-90. Even in the 30 largest newspaper markets, the number of cities with more than one competitive newspaper had dropped from 25 in 1950 to 9 in 1986. J.A. 565; J.A. 537-38; J.A. 539-40. In addition, at the time of the hearing in Detroit, of the 30 largest newspaper markets, there were only 4 where the second or smaller newspaper was even marginally profitable and none where the second newspaper was earning more than a marginal profit. J.A. 565; J.A. 537-38; J.A. 539-40. Given these economic realities, the incentive for a competing newspaper to become or remain the dominant, or leading, daily newspaper in its market is obvious. That lesson was apparent to newspaper publishers, and to Congress, well before the Attorney General's decision in the Detroit case and well before Congress enacted the Newspaper Preservation Act in 1970.

II. NEWSPAPER COMPETITION IN DETROIT

A. The News and Free Press Fight for Survival

The Attorney General found that competition in Detroit was waged "energetically, but both responsibly and properly." J.A. 151. The record before the Attorney General

established that in the late 1970s or early 1980s management at both the Free Press and the News concluded that there was no safe place for a second-place newspaper in Detroit. J.A. 143-44. That judgment was based, in part, on an awareness of the fate of second-place newspapers in Washington, Philadelphia, Cleveland, Buffalo, and dozens of other major cities in which the competitive battle had resulted in the death of the second-place newspaper, and, in part, upon the economic realities of the newspaper business discussed above. J.A. 504-09; J.A. 208, 212-13; J.A. 404-05; J.A. 443-44; J.A. 325-26. Both the Free Press and the News concluded that victory in the great Detroit newspaper war was necessary, not to feed their pride, but to ensure survival. J.A. 405; J.A. 510; J.A. 208, 212-16.

Because of that fundamental conclusion, both newspapers adopted strategies to gain or maintain leadership, or dominance, particularly in daily and Sunday circulation in their primary circulation marketing area and in the crucial areas of retail and classified advertising lineage and revenues. Both newspapers saw leadership in these competitive categories as the only path to long-term profitability and survival, and both papers fought aggressively to win those competitive battles. The ALJ found that the

Free Press and Knight-Ridder as well as News and ENA management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many junior newspapers which had not been able to survive as the second paper in metropolitan area competition.

Pet. App. 19a.

The principal difference between the strategies of the two newspapers was that the News was fighting to maintain its leads in all important areas of competition while the Free Press had to struggle to overtake the News' existing competitive advantages. In pursuit of its

goal, the Free Press brought to Detroit the executives who had won a "great newspaper war" in Philadelphia, built a state-of-the-art printing plant, engaged in heavy circulation promotion and discounting, and competed aggressively for advertising by offering discounts. Pet. App. 17a-18a.

The pressures on the Free Press were especially acute because it was attempting to stave off the effects of the downward spiral by "buying [its] way out of it." Tr. 2240-41 (Morton). Like other papers before it (*i.e.*, The Philadelphia Bulletin and the Washington Star, both of which eventually closed), the Free Press, although feeling the effects of the downward spiral, directed its efforts towards masking it through huge expenditures. See NX 800 Z-30-33 ¶¶ 96-100 (Rosse). As John Morton testified, the downward spiral was

something that the Free Press has been spending mightily to avoid getting into for the last several years. It's my belief that should they stop their investment and capital projects, promotion, product improvements, they would very quickly slip into it.

Tr. 2240 (Morton).

During this competitive battle, the Free Press was owned by Knight-Ridder, the second largest newspaper group in the country. The News was owned by the smaller Evening News Association ("ENA"). Despite the fact that it was competing with a paper whose parent had much greater resources, the News under ENA determined to take whatever action was necessary to preserve its lead in the Detroit market. Peter Clark, President of ENA, testified at the hearing that

because a newspaper gets the vast majority of its total revenues from advertising, it is essential to insure that the advertising revenue continues to come in. To do so, a competitive metropolitan daily newspaper must have a higher circulation than its com-

petitor, and the location of that circulation must be attractive to advertisers.

J.A. 511.

Accordingly, when the Free Press used its position as the only morning newspaper in the State of Michigan to narrow the News' overall circulation lead, the News responded by introducing its own morning edition. The News built a new suburban plant to better serve suburban and out-state subscribers with more timely news. In addition, the News, as well as the Free Press, engaged in heavy circulation discounting to promote sales of the newspapers. J.A. 518; Tr. 1382-84, 1395-96 (Clark); J.A. 584-85; Tr. 1065-66 (Hall); Tr. 2884 (Lawrence).

When the Free Press raised its daily single copy price in 1979 to 20¢ from 15¢, the News refused to follow—its price remains 15¢ today.⁵ J.A. 512; J.A. 518; J.A. 214-16; Tr. 1511 (Clark); J.A. 340-42. Robert Nelson, Publisher of the News under the ENA, testified that "advertising share of field is predicated to a great extent on circulation." J.A. 335A. Accordingly, his position was "that The Detroit News was not going to increase its price." J.A. 337-41. That policy was adopted because of a concern that to increase the price would result in a loss of circulation. "We've had a history of what's happened when we've increased the price and we've had a loss." J.A. 341-42, 348 (Nelson). "I was going to be able to increase my lead over the Free Press on the daily paper and the Sunday paper, and I wasn't going to do a single thing that wasn't going to allow me to do that." J.A. 341 (Nelson).

Peter Clark, then President of ENA, explained in his testimony:

⁵ The News' philosophy on circulation goes back to its founding in 1873. The News was founded as a two-cent paper in a city where the other papers sold for five cents. Tr. 1499-1500 (Clark).

Q. Now, as I understand your direct testimony, the ENA strategy grew out of a belief that you and other members of the ENA board held in the early 1980s that in the long term Detroit could not support two metropolitan daily newspapers. Is that a fair summary of your direct testimony?

A. Well, in 1982 or so I concluded that it was no longer possible for this marketplace to sustain two major daily newspapers in competition. The rest of the board, I think at least most of them, came to agree with that over a period of months or years.

Q. And as a corollary to that belief, you also felt that there was no safe niche for a second newspaper in this city, correct?

A. That's correct.

Q. And indeed, you felt that if the News became the No. 2 newspaper in this town, it wouldn't survive?

A. I felt that—that's correct. I thought we might have four to five years of survival if we became No. 2 but would inevitably die.

J.A. 208.

* * *

Q. Did you draw any other conclusions from your observations of what was happening in other cities to second newspapers in those markets?

A. Well, I concluded somewhere in the 1980s that in the big-city metropolitan newspaper competitive situations a second paper could not survive. I suppose I reached that conclusion at the same time I reached it about the Detroit situation, in the early or mid-1980s. A second paper I thought could not make it any more. That's not New York City, but that is the others that we have touched on.

Q. What effect on your resolve to keep The Detroit News No. 1 did that conclusion have?

A. Well, if anything it made us fight more fiercely. I think the record shows we fought like hell to save The Detroit News.

J.A. 213.

When asked about the reasons ENA did not raise the single copy price to 20¢ when the Free Press did in 1979, Mr. Clark explained:

A. The decision not to move the price, the cover price and home delivery total price of The Detroit News in 1979 was based on the basic necessity to keep the paper in the No. 1 position in aggregate total circulation and also in circulation in the PMA in order to survive. J.A. 214-15.

* * *

A. The desire to be No. 1 was a commercial motive because, No. 1, being No. 1 was the basis for the share of advertising market that we then enjoyed and wanted to continue to enjoy, and the advertising that that share produced is what is the lifeblood of our company. It's what kept us going, especially retail and classified revenues. Without the circulation share we would not have had the advertising share. Without the advertising share we wouldn't have had the revenues and we would have been gone. J.A. 215.

In 1985, when ENA was experiencing substantial shareholder unrest, the News decided to follow a Free Press increase in the circulation price of the Sunday paper. The News did so in part because it had a very substantial lead on Sunday and in part because of the shareholder unrest.⁶ Nevertheless, ENA officials concluded that follow-

⁶ ENA's shareholder unrest in 1985 ultimately led to a tender offer being made for ENA's stock by a non-newspaper company. In response, ENA solicited the interest of certain companies, including Gannett. In August 1985, Gannett made an offer to purchase ENA which was consummated in February 1986.

ing the Free Press circulation price increase on Sundays was a mistake not to be repeated. J.A. 518; Tr. 3401-04 (Nelson); Pet. App. 90a.

Despite the intensive efforts of the Free Press to overcome the News' leads and despite Knight-Ridder's deeper pockets, in 1985, the last year under ENA (rather than Gannett) ownership:

- The News' market share lead in total daily circulation was slightly greater than it had been in 1976, the year that the News started a morning edition. JX 1; Pet. App. 40a.
- Although the Free Press had made slight gains in market share on Sunday, it still trailed the News by over 81,000 papers. NX 1H. See JX 2. Sunday is the most important edition because it has the largest circulation and is the most attractive to advertisers. J.A. 378-79, 380; J.A. 482; Pet. App. 43a-44a.
- In the three-county primary market area which is most important to advertisers (Pet. App. 44a) the News' circulation lead was still over 242,000 papers on Sunday and 105,000 papers daily. NX 1H.
- The Free Press share of advertising revenues, which account for 72% of its total revenues (Pet. App. 58a) had declined since 1982 and its advertising revenues were more than \$60 million lower than those of the News. JX 12; NX 613A-B.
- The Free Press share of combined daily and Sunday full run advertising lineage was at a ten-year low and it trailed the News 56,476,636 lines to 35,140,749 lines for the Free Press. JX 19; NX 2X; Pet. App. 59a-65a.
- The News led in classified advertising by 23,857,297 lines to 11,050,828 lines, a nearly 70% market share. Pet. App. 67a-69a. Classified advertising is especially important because it serves as a stimulus to circulation. J.A. 481; J.A. 373-74; Pet. App. 66a-67a.

- Total retail advertising for both Detroit newspapers had declined from 54,719,098 lines in 1978 to 38,808,914 in 1985 and the Free Press share of this diminishing total had declined to 42.6%, a ten-year low. JX 16; Pet. App. 67a. Retail advertising is the most important source of newspaper revenues (J.A. 542-43), accounting for 81% of News and 72% of Free Press total revenues, respectively. Pet. App. 58a.

Despite all of its competitive efforts to take the circulation and advertising leads, the Free Press found itself in 1985, after spending well over \$150,000,000 in losses and cash investments since 1980, reduced to hoping that the much smaller ENA, which was experiencing shareholder unrest, would lose its resolve. J.A. 406.

B. "Win-Win"

When the ENA shareholders unrest ultimately led to the sale of ENA, and with it the News, to the nation's largest newspaper group, the Free Press may have hoped that the new owners would abandon the aggressive competition which had stymied the Free Press. They were, however, disappointed. Tr. 1030-31 (Hall); Tr. 3009 (Lawrence); Pet. App. 91a. Mr. Neuharth, Chairman of Gannett, testified that he adopted a "win-win" strategy for the News. J.A. 225, 228-29. See also J.A. 480-81. The News would continue to strive to enhance its competitive position until it was a clear winner in all important areas of competition. Gannett took steps to increase the News' circulation lead through improved editorial content, increased promotion, and decreased single copy prices in the out-state area, which had been the Free Press' strongest circulation area. J.A. 484-85. Mr. Neuharth testified that:

When Gannett acquired the News in February 1986, we were fully aware of an economic fact of life in the newspaper business:

- the dominant newspaper ultimately thrives;
- the weaker paper ultimately dies.

One need look only at the major newspaper deaths in just the last five years in Philadelphia, Cleveland, Buffalo, Washington, St. Louis, and most recently Baltimore, to become painfully aware of this fundamental principle for major newspaper markets.

With this truism in mind, my instruction to the new management team in Detroit was simple: the News was to be the *clear winner* in every important category of competition in its circulation and advertising markets.

J.A. 480-81. See also J.A. 220. The policies adopted by the News were designed to assure that whether or not a JOA was approved, the News would be the surviving newspaper in Detroit. That was the "win-win" strategy. Pet. App. 83a.

On cross examination by the Antitrust Division, Mr. Neuharth elaborated:

So the facts, very simply, are that in most, nearly all, of those situations, the economic facts of life in the newspaper business have been for the past 40 years the dominant newspaper, if it maintains its dominance long enough or enhances it, it ultimately thrives; the weaker newspaper ultimately dies. Sad but true.

Q. Why does the weaker paper stay in the market?

A. For a variety of reasons. Sometimes the weaker paper is owned by an individual or family that has other means of financial support and sometimes can afford to maintain a long family tradition irrespective of the bleeding from a losing operation. Sometimes—less so in the 1980s but more true in the '40s and '50s—there have been political reasons by the owners of a newspaper that was weaker or non-profitable sustained it with a life support system.

Sometimes an owner, parent company, has bet on the long term and taken a risk that circum-

stances would change and therefore has kept it alive.

So there are a variety of reasons. But in every instance—every instance—the weaker newspaper has either died or been saved by a JOA or is presently in danger of dying. There are no exceptions in this country.

Q. But those that are presently in danger of dying, might there not be some whose publishers hope to reverse the trends and become the dominant paper?

A. Oh, absolutely and the publishers of those who did die also hoped to do that.

But I'm not talking about hope. I'm talking about reality, not hopes or fiction or speculation—reality—and the facts are that those are the realities in the newspaper business.

J.A. 220-21.

While under Gannett ownership the News has increased its circulation lead, the real significance of the News' policies under Gannett is that the Free Press' hope that ENA management would make a mistake and lose its competitive resolve had been dashed. Gannett's operations of the News by April 1986 made clear that it would not abandon the policies which had, under ENA management, given the News its position of leadership in the important areas of competition. J.A. 222-24.

Petitioners suggest that Gannett's willingness to enter into a JOA somehow indicates that the Free Press was not a failing newspaper within the meaning of the Newspaper Preservation Act. This argument is, of course, circular and, if accepted, would be sufficient to defeat any joint operating arrangement.

A similarly flawed argument is petitioners' suggestion that because Gannett agreed to a joint operating arrange-

ment which, after five years, gave the Free Press 50% of the joint operating profits, the Free Press must not have been a failing newspaper.⁷ While Congress had directed that the Attorney General make the determination of whether a newspaper is in probable danger of financial failure "regardless of its ownership or affiliations," the ownership of the Free Press was not a fact that Gannett could ignore in considering whether to enter into a joint operating arrangement in Detroit. Although Mr. Neu-harth, then Chairman of Gannett, believed that the Free Press was a financial failure, he could not know how long Knight-Ridder, with its considerable resources, would continue to pour money into the Free Press. It was that uncertainty, coupled with the smaller but nonetheless substantial losses at the News, that gave the Free Press whatever bargaining power it had. To suggest, as do the petitioners, that it is premature to enter into a joint operating agreement before the failing newspaper and its parent have lost all bargaining power flies directly in the face of Congress' intent in enacting the Newspaper Preservation Act.

The record establishes that implementation of the JOA is the only way to return the Free Press to profitability and prevent it from following the Washington Star, The Philadelphia Bulletin, the Cleveland Press, the Buffalo Courier-Express and the Baltimore News-American to the newspaper graveyard. The ALJ rejected several possible alternatives such as cost-cutting by the Free Press (Pet. App. 100a-102a), further geographic segmentation by the Free Press (Pet. App. 102a-103a), emulation of The New York Times demographic segmentation approach (*id.*), or unilateral circulation or advertising price increases by the Free Press (Pet. App. 93a). Even the Antitrust Division's economic expert

⁷ The 50/50 profit split in the Detroit agreement is not unique or unusual. Eleven of the original twenty-two joint operating agencies began with 50/50 profit splits. Tr. 2362-63 (Morton).

witness testified that she knew of no independent action, either in the form of unilateral price increases or otherwise, that could return the Free Press to profitability. Pet. App. 100a.

The only alternative offered by petitioners to save the Free Press is their reliance on the statement that "the ALJ concluded that the papers *might* raise their prices if the JOA were denied." Pet. Br. 8 (emphasis added). Petitioners would have this Court, the Attorney General, and the Free Press place the future of the Free Press on this single "might."

Obviously, as the Attorney General found, a joint price increase without a JOA was not an available alternative since such "collusion or collaborations" would be "improper" and illegal. J.A. 151. Similarly, the ALJ rejected the possibility of unilateral price increases:

[T]he Antitrust Division and Intervenor did not seriously challenge the evidence showing that future profitability could not be accomplished by any additional circulation price increases by either the Free Press or the News which was not followed by the other.

Pet. App. 89a-90a. He continued in a footnote:

While the record did not establish the price demand elasticities of the Detroit newspaper market, it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses, including, perhaps, discounts off the increased circulation price. A loss of circulation may in turn require a reduction in advertising prices because of the effect on milline rates.

Id. The ALJ also found that neither paper could unilaterally increase the price of advertising because such a price increase would erode the advertising in that newspaper and have an effect on circulation. Pet. App. 93a.

None of these conclusions, which were adopted by the Attorney General, is challenged by petitioners. The only remaining alternative identified by the petitioners or the ALJ is speculation that "absent a JOA Gannett *may* eventually initiate circulation price increases." Pet. App. 92a. Unfortunately, however, that speculation does not alter the fundamental economic realities of the newspaper business in Detroit. That speculation does not change the conclusion of the News management, adopted long before any JOA discussions, that there is no safe place for a second-place newspaper in Detroit (J.A. 504-09, 208, 212), or the News' conviction that it will not permit itself to become the second place newspaper (J.A. 241-42). Nor does that speculation change the testimony of the nation's leading newspaper economist, James Rosse, Provost of Stanford University, that the current policy of the News of acting to preserve its market leadership was the only strategy with any likelihood of success. J.A. 576; J.A. 320-21; Pet. App. 109a.

In the face of these *realities*, the Attorney General concluded:

Gannett has made clear that it has no intention of embarking on such a course [of price increases] either unilaterally or in conjunction with Knight-Ridder. . . . While the Administrative Law Judge questioned the testimony of Gannett to this effect . . . , it hardly reflects unsound business judgment to retain a while longer the News' current depressed pricing practices with so many indications that the Free Press and Knight-Ridder have abandoned all hope of market domination.

J.A. 148-49. A contrary view must assume that the News will ignore the economic realities of the newspaper business embodied in the Newspaper Preservation Act, and put at risk, by its own action, its own survival.

III. COMPETITION IN LITTLE ROCK

Little Rock Newspapers, Inc. ("LRNI"), publisher of the Arkansas Democrat in Little Rock, has filed here, as it did below, a brief suggesting that the Attorney General's decision should be overturned because (1) "it was based on a competitive situation created entirely by the interactive intentional conduct of the parties and not by market conditions;" (2) it "rewards potentially predatory conduct;" and (3) it creates a "blueprint for destruction of newspaper competition in Little Rock and elsewhere." LRNI Br. 17, 19, 22.⁸ LRNI's position is wrong on all three counts. First, the "interactive intentional conduct of the parties" to which it refers is head-to-head competition between two daily newspapers, precisely the sort of competition which Congress found was compelled by the unique economics of the newspaper business. Second, not only was there no finding of illegal predatory pricing in Detroit, no suggestion by the Antitrust Division that there was any such predatory pricing, and no record evidence cited by LRNI of predatory pricing in Detroit, but the Attorney General squarely found that the newspaper competition in Detroit was "waged energetically but both responsibly and properly." J.A. 151.⁹ Third, the

⁸ In addition, the LRNI brief contains an extraordinary argument that the congressional intent in passing the Newspaper Preservation Act was to "raise barriers to future JOAs by stiffening the qualification requirements" LRNI Br. 10. This argument and the related suggestions in petitioners' brief fly so squarely in the face of congressional intent to reject the "failing company" test of *Citizen Publishing* that reference to the legislative history discussed above is a sufficient response. See pages 5-7, *supra*.

⁹ There has been no allegation and no evidence presented that the Detroit newspapers' prices were below an "appropriate measure of cost". *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 n.12 (1986). Given the lack of evidence of the often controversial elements of predatory pricing (see generally *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584, n.8 (1986)), this is not the case to test the proposition that natural

blueprint for survival in a newspaper war is set out not by the Attorney General's decision, but by fundamental economic realities of the newspaper business—realities LRNI understands only too well.

To understand the full irony of LRNI's position before this Court, however, it is necessary to describe some of the background, omitted from LRNI's brief, about newspaper competition in Little Rock.¹⁰ LRNI is part of a privately-held media organization which owns six daily newspapers, television stations, cable television operations, and other properties, and publishes the daily and Sunday Arkansas Democrat in Little Rock. Not long after LRNI acquired the money-losing Democrat in 1974, LRNI adopted an aggressive competitive strategy designed to increase the Democrat's circulation and advertising market shares. For example, LRNI offered all private parties *free* classified advertising. Each week LRNI distributed one full edition of the Democrat free to non-subscribers and it offered substantial special discounts to large advertisers, including a major department store, to place an unlimited amount of advertising in the Democrat at no additional cost. It would be hard to imagine any more aggressive newspaper pricing than free advertising and free distribution. Certainly there is no suggestion that either of the newspapers in Detroit went nearly as far as LRNI.

These and other competitive pricing practices by LRNI resulted in increasing the size of its losses from less than

monopolies are not subject to Sherman Act § 2 challenges, or that "the monopoly resting in economies of scale should be immune from antitrust restructuring" 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 621a, at 50 (1978). Beyond that, it is clear that the newspapers' prices were set by competitive conditions dictated by the unique economics of the newspaper industry. See *supra*, at 23-26.

¹⁰ These factual statements are drawn from the Opposition of The Detroit News, Inc. to the Motion of Little Rock Newspapers, Inc. for Leave to Appear as Amicus Curiae in the District Court, at 4-6. See n.3, *supra*.

\$1,000,000 in 1977 to \$7,600,000 in 1983 (the year before LRNI was sued by the Gazette for predatory practices). From the time LRNI purchased the Democrat in 1974 to the time of that lawsuit, LRNI rang up over \$40,000,000 in losses in Little Rock.

In defending the predatory pricing lawsuit, LRNI claimed that it was merely engaged in aggressive competition which was necessary for its survival. It maintained that there was nothing wrong with using its deep pockets to subsidize the losses in Little Rock. LRNI responded to the claim that its pricing practices would put the Gazette out of business by suggesting that the Gazette's prices were too high and that the Gazette should have responded to the Democrat's strategies with aggressive competition of its own. LRNI rested its defense on the claim that

[p]rice reductions tend to benefit consumers and the Sherman Act does not prevent a company from lowering its prices to gain enough market share to earn a profit or to compete and survive in a competitive environment.

Opposition of The Detroit News, Inc., at 5. See n.3, *supra*. After the litigation ended in a jury verdict in favor of LRNI, the independent owner of the Gazette concluded that it could not afford the substantial operating losses that the Gazette had begun to suffer as a result of LRNI's aggressive competition, and decided to sell the Gazette to a company with sufficient resources to respond to LRNI's competition.

The sale of the Gazette to Gannett in December 1986 put the Gazette in a position to respond, for the first time, to LRNI's continued aggressive competition. LRNI's Brief and the attached Affidavit of its major shareholder, Mr. Walter Hussman, make much of the Gazette's 85¢ per week circulation price offer, but do not mention that the offer was made in response to an LRNI pro-

gram that charged subscribers less than 85¢ per week. After filing its brief in this Court complaining of the Gazette's low prices, LRNI announced that Sunday subscribers could receive the Wednesday, Friday and Saturday papers "*at no additional cost.*" See "Dear Reader" letter from Walter J. Hussman, Jr., attached as an appendix to this brief (emphasis in original). In the same announcement, LRNI compared its price of \$10 per year for Wednesday, Friday, Saturday and Sunday to the \$26 price charged by the Gazette for only Friday, Saturday and Sunday. Under its new offer, LRNI's price for the Democrat is *less than 5¢ per copy including Sunday.*

LRNI's only consistent position seems to be that aggressive price competition to build circulation and advertising market shares is a rational, reasonable and necessary business practice only so long as LRNI is the party engaging in that practice. While LRNI's lawyers suggest the competitive strategies adopted by the newspapers in Detroit are "irrational" and that the Attorney General's decision provides a blueprint for future conduct, Mr. Hussman's conduct in Little Rock speaks louder than his attorneys' words. He did not need the Attorney General to tell him that the only way to return his second place newspaper to profitability was to engage in aggressive competition by reducing prices for circulation and advertising in order to build market share. His company with its deep pockets incurred losses of over \$40,000,000 to finance that competition against the then owner of the Gazette with its much smaller pockets.

LRNI successfully defended the predatory pricing lawsuit brought by the former owner of the Gazette by establishing that aggressive competitive practices, such as offering free classified advertising, distributing one edition of the newspaper a week free to non-subscribers and offering huge cuts in advertising prices to selected advertisers, were necessary for survival and the only path to future profitability for LRNI's newspaper in Little Rock.

Mr. Hussman's actions in Little Rock are eloquent testimony that the pricing practices engaged in by both newspapers in Detroit, far from being "irrational" or predatory, have been their only hope for survival. Although Mr. Hussman's attorneys make a distinction between what they call "interactive intentional conduct of the parties" and "market conditions," Mr. Hussman knows that the competitive process between two metropolitan daily newspapers is a very real "market condition," in which a voluntary decision not to compete is suicide.

Ironically, Mr. Hussman's conduct in Little Rock confirms that every newspaper publisher involved in this proceeding, whatever the size of its pockets, has reached the same conclusion as to what it takes to survive in a competitive newspaper market. The Free Press in Detroit, under Knight-Ridder's ownership with its deep pockets, concluded that it must compete aggressively to become the dominant newspaper in circulation and advertising to have a chance for survival. The News under ENA's ownership, with its then smaller pockets, concluded that its only course was to fight to preserve its leadership position in circulation and advertising in the Detroit market. The News under Gannett's ownership determined that it must continue the policies adopted under ENA's ownership to ensure that the News was the clear winner in the key competitive areas of circulation and advertising. Mr. Hussman determined in Little Rock that his only method of returning the Democrat to profitability was to compete aggressively by giving away advertising and circulation to build advertising and circulation market share.

It is not surprising that the publishers of each of these newspapers have chosen the same basic course for survival in the face of head-to-head competition in their newspaper markets. The unique economics of the newspaper business give them no other choice. Congress expressly recognized that among the factors accounting for

the failure of newspapers and justifying a JOA were "price war conditions." 116 Cong. Rec. 1787 (1970) (statement of Sen. Bennett). To suggest, as LRNI does in its brief, that competing for survival somehow disqualifies a newspaper for the exemption under the statute designed to preserve separate newspaper editorial voices, is to stand the Newspaper Preservation Act on its head.

CONCLUSION

For the foregoing reasons The Detroit News, Inc. submits that petitioners' invitation for this Court to (1) ignore the economic realities of the newspaper business and (2) emasculate the Newspaper Preservation Act, should be declined.

Respectfully submitted,

LAWRENCE J. ALDRICH
SENIOR LEGAL COUNSEL
GANNETT Co., INC.
P.O. Box 7858
Washington, D.C. 20044
(703) 284-6000

JOHN STUART SMITH
Counsel of Record
GORDON L. LANG
CORRINE M. YU
NIXON, HARGRAVE, DEVANS
& DOYLE
One Thomas Circle, N.W.
Suite 800
Washington, D.C. 20005
(202) 223-7200

*Counsel for Respondent
The Detroit News, Inc.*

Dated: August 11, 1989

APPENDIX

APPENDIX

Arkansas Democrat

Dear Reader:

This week the ARKANSAS DEMOCRAT is launching "Weekend Plus". Our Sunday subscribers will now receive our Wednesday, Friday and Saturday papers—at *no additional cost*.

And for a limited time, we are offering *new subscribers* a special introductory rate of \$10 per year for "Weekend Plus"—that's half off our regular Sunday rate.

Many people say the ARKANSAS DEMOCRAT is better than ever. We agree, and want you to enjoy some of the award-winning journalism, exclusive advertising and special sections found in all our issues.

As you may know, the GAZETTE recently increased the price of its weekend subscriptions 160%, from \$10 to \$26! So, here's the comparison:

Newspaper	Days Included	Price for New Subscribers
DEMOCRAT	Wednesday, Friday, Saturday & Sunday	\$10
GAZETTE	Friday, Saturday & Sunday	\$26

We at the ARKANSAS DEMOCRAT believe we are offering you a *better paper, at a better price*.

Mail back the enclosed envelope with your check to start delivery of "Weekend Plus". Or give us a call at 378-3456.

We hope you will enjoy the ARKANSAS DEMOCRAT.

Sincerely,

/s/ **Walter E. Hussman, Jr.**
WALTER E. HUSSMAN, JR.
Publisher

WEHJr/vag

Capitol and Scott Little Rock, Arkansas 72203
Telephone (501) 378-3400

13
No. 88-1640

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR
AN INDEPENDENT PRESS, ET AL., PETITIONERS

v.

DICK THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

LAWRENCE G. WALLACE
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
DOUGLAS LETTER
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

5492

QUESTION PRESENTED

Whether the Attorney General of the United States acted arbitrarily or capriciously in approving the application filed by the *Detroit Free Press* and *The Detroit News* for a joint newspaper operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, after concluding that the *Free Press*, "regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)), and that approval of the application would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States" (15 U.S.C. 1801).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
A. The background and statutory scheme of the Newspaper Preservation Act	3
B. The administrative proceedings regarding the application of the <i>Detroit Free Press</i> and <i>The Detroit News</i> for approval of the joint operat- ing arrangement	7
C. The decisions of the district court and the court of appeals upholding the Attorney General's approval of the joint operating ar- rangement	15
Summary of argument	19
Argument:	
The Attorney General's approval of the application filed by the <i>Detroit Free Press</i> and <i>The Detroit News</i> for a joint operating arrangement is fully con- sistent with the statutory requirements of the Newspaper Preservation Act	24
I. The Newspaper Preservation Act authorizes the Attorney General to approve an applica- tion for a joint operating arrangement if at least one of the newspaper applicants is a "failing newspaper" and approval of the ap- plication would "effectuate the policy and purpose" of the Act	24

IV

	Page
II. The Attorney General, applying the statutory standards for approval of a JOA, properly determined that the <i>Detroit Free Press</i> is a failing newspaper and that the proposed JOA "would effectuate the policy and purpose" of the Newspaper Preservation Act	29
III. Because the Attorney General properly applied the statutory framework of the Newspaper Preservation Act to the particular facts of the Detroit market, no <i>Chevron</i> issue is presented.....	42
Conclusion	46

TABLE OF AUTHORITIES

Cases:

<i>American Press Ass'n v. United States</i> , 245 F.2d 91 (7th Cir. 1917)	4
<i>Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.</i> , 419 U.S. 281 (1974)	30
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	23, 42, 43, 45
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	4, 33
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	30
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983)	6, 12, 17, 19, 25, 27, 31, 43, 44
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	42
<i>International Shoe Co. v. FTC</i> , 280 U.S. 291 (1930)	4
<i>Knutson v. Daily Review, Inc.</i> , 383 F. Supp. 1346 (N.D. Cal. 1974), modified, 401 F. Supp. 1374 (N.D. Cal. 1975), aff'd in part and rev'd in part, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977)	40

V

Cases — Continued:	Page
<i>Mobil Oil Co. v. FPC</i> , 417 U.S. 283 (1974)	30
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.</i> , 463 U.S. 29 (1983)	20, 30
<i>NLRB v. United Food & Commercial Workers Union, Local 23</i> , 108 S. Ct. 413 (1987)	45
<i>Times-Picayune Publishing Co. v. United States</i> , 345 U.S. 594 (1953)	40
<i>United States v. Citizen Publishing Co.</i> , 280 F. Supp. 978 (D. Ariz. 1968), aff'd, 394 U.S. 131 (1969)	4, 37
<i>United States v. Doe</i> , 465 U.S. 605 (1984)	37
<i>United States v. Florida East Coast Ry.</i> , 410, U.S. 224 (1973)	29
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	26, 27
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	20, 30

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i>	15
5 U.S.C. 706	3
5 U.S.C. 706(2)(A)	20, 30
5 U.S.C. 706(2)(E)	29
Bank Merger Act, 12 U.S.C. 1828 <i>et seq.</i> :	
12 U.S.C. 1828(c)(3)	27
12 U.S.C. 1828(c)(4)	27
12 U.S.C. 1828(c)(5)(B)	26, 27
12 U.S.C. 1828(c)(6)	27
Clayton Act, § 7, 15 U.S.C. 18	4
Newspaper Preservation Act, 15 U.S.C. 1801 <i>et seq.</i>	3, 5, 19, 24
15 U.S.C. 1801	2, 20, 28
15 U.S.C. 1802	2
15 U.S.C. 1802(2)	7
15 U.S.C. 1802(5)	2, 7, 19, 24, 25, 31

VI

Statutes and regulations — Continued:	Page
15 U.S.C. 1803	2
15 U.S.C. 1803(a)	6, 31-32
15 U.S.C. 1803(b)	2, 6, 19, 24, 25, 26, 28, 34
15 U.S.C. 1803(c)	7
Sherman Act, 15 U.S.C. 1 <i>et seq.</i> :	
§ 1, 15 U.S.C. 1	4
§ 2, 15 U.S.C. 2	4
28 C.F.R.:	
Section 48.2(a)	8
Section 48.7	8
Section 48.10(b)	8
Section 48.11	8
Section 48.13(b)	8
Miscellaneous:	
116 Cong. Rec. (1970)	6
p. 1783	6
p. 1785	6
p. 1788	6
47 Fed. Reg. (1982):	
p. 26,472	12
p. 26,473	12
H.R. Rep. No. 1193, 91st Cong., 2d Sess. (1970) ..	3, 4, 5, 33, 39
E. Hynds, <i>American Newspapers in the 1980s</i> (1980)	3, 41
Knox, <i>Antitrust Exemptions for Newspapers: An Economic Analysis</i> , 1971 Law & Soc. Order 3 ..	6
Martel & Haydel, <i>Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages</i> , 1984 B.Y.U. L. Rev. 123	5, 27, 41

VII

Miscellaneous — Continued:	Page
S. Oppenheim & C. Shields, <i>Newspapers and the Antitrust Laws</i> (1981)	6, 40, 41
S. Rep. No. 535, 91st Cong., 1st Sess. (1969)	5, 6, 29, 33, 39, 41

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR
AN INDEPENDENT PRESS, ET AL., PETITIONERS

v.

DICK THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 166a-197a) is reported at 868 F.2d 1285; the opinions filed on denial of the petition for rehearing (Pet. App. 198a-211a) are reported at 868 F.2d 1300. The opinion of the district court (Pet. App. 149a-163a) is reported at 695 F. Supp. 1216. The decision of the Attorney General (Pet. App. 136a-147a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. A petition for rehearing was denied on February 24, 1989 (Pet. App. 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989, and was granted on May 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 15, United States Code, Section 1801, provides:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Title 15, United States Code, Section 1802, provides in pertinent part:

* * * * *

(5) the term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

Title 15, United States Code, Section 1803, provides in pertinent part:

* * * * *

(b) **Written consent for future joint operating arrangements**

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

STATEMENT

Petitioners, two citizen groups and six private individuals, filed this action against the Attorney General of the United States and two newspapers, the *Detroit Free Press* and *The Detroit News*, in the United States District Court for the District of Columbia. Petitioners challenged the Attorney General's approval of the joint operating arrangement between the *Free Press* and the *News* as violating the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706. On cross-motions for summary judgment, the district court upheld the Attorney General's decision. The court of appeals affirmed that judgment, finding that the Attorney General had properly applied the statutory framework to the facts presented.

A. The Background and Statutory Scheme of the Newspaper Preservation Act

1. Over the last 80 years, metropolitan newspapers in the United States have failed at an alarming rate. As a result, a large majority of American communities are served today by a single local newspaper. See H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3-4 (1970); E. Hynds, *American Newspapers in the 1980s* 139 (1980) ("By the late 1970s fewer than four percent of the nation's cities had competing newspapers.").

To combat this trend, endangered newspapers began in the 1930s to form "joint operating arrangements" (JOAs) with their competitors. Under the typical JOA, each newspaper reduces its costs by combining the business aspects of publishing, but retains its own editorial and news staffs and policies. H.R. Rep. No. 1193, *supra*, at 3-4. When these arrangements were challenged as unreasonable restraints of trade under the federal antitrust laws, the courts generally upheld the JOA under the "failing com-

pany" defense, a judicially-created doctrine that permits otherwise illegal business agreements to go forward when one of the firms involved is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. See, e.g., *American Press Ass'n v. United States*, 245 F. 91, 93-94 (7th Cir. 1917); see also *International Shoe Co. v. FTC*, 280 U.S. 291, 299-303 (1930). As a consequence, the JOA mechanism saved a number of otherwise failing newspapers. By 1966, 22 such joint newspaper operating arrangements existed in the United States. H.R. Rep. No. 1193, *supra*, at 4-5.

2. In 1968, however, the Department of Justice, in an action filed in the District of Arizona, challenged the JOA between the two newspapers serving Tucson, Arizona, claiming that the arrangement constituted an illegal merger, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, as well as a restraint on trade and a monopoly, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. The district court sustained the Department's challenge and declared the JOA illegal; the court accordingly ordered the newspapers to dismantle their joint operations and reestablish two separate and independent newspapers. *United States v. Citizen Publishing Co.*, 280 F. Supp. 978 (D. Ariz. 1968).

On direct appeal to this Court, the judgment was affirmed. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). This Court held that the Tucson JOA constituted an illegal merger under the Clayton Act, and involved prohibited price fixing, profit pooling, market allocation, and monopolization under the Sherman Act. In so holding, the Court strictly applied the "failing company" defense. 394 U.S. at 136-139. The Court found no evidence that the allegedly failing newspaper was considering liquidation, soliciting a purchaser, or grasping at the

JOA as a "last straw" (*id.* at 137). Furthermore, since the failing newspaper's competitor had been willing to join forces and split future profits, the newspaper could not be considered to be on "the brink of collapse," and thus could not qualify as a "failing" company (*id.* at 137-138).

3. In the meantime, Congress, in response to the district court's ruling, had convened hearings to determine the proper standard for allowing newspapers to enter into JOAs.¹ Within two months of the Court's decision in *Citizen Publishing*, Congress passed legislation to overturn that decision. See H.R. Rep. No. 1193, *supra*, at 10. On July 24, 1970, the President signed into law the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

In enacting the Newspaper Preservation Act, Congress recognized that unique economic forces affecting the newspaper industry make it difficult for two major newspapers to coexist in one metropolitan market. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Specifically, Congress was aware of the interdependence of circulation and advertising revenue in the newspaper industry. Increases in circulation attract additional advertisers; loss of readership, on the other hand, pushes advertisers away—which, in turn, tends to cause further loss in circulation. As a result of this phenomenon, in a two-newspaper market a newspaper that takes a decisive lead over its rival in circulation and advertising will almost inevitably strengthen its competitive position. Conversely, readers and advertisers will invariably abandon a newspaper that falls markedly behind. Thus, a newspaper that loses a significant percentage of market share to its rival may become

¹ During the pendency of the case, the 90th and 91st Congresses heard testimony from 168 witnesses, amassed a 5200-page hearing record, and engaged in extensive floor debates that fill some 150 pages in the Congressional Record. See, e.g., H.R. Rep. No. 1193, *supra*, at 6-7; Martel & Haydel, *Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages*, 1984 B.Y.U. L. Rev. 123, 135.

trapped in a "downward spiral" of declining circulation and advertising that eventually leads to financial ruin.²

Congress determined that these unique economic factors, together with newspapers' vital role in society, called for specific federal action to preserve "[f]inancially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous and unpopular stands on public issues * * *." S. Rep. No. 535, *supra*, at 3. To accomplish this goal, Congress expressly permitted newspapers to enter into joint business operations before they reach the point of dire financial distress required by *Citizen Publishing*, provided they receive the prior approval of the Attorney General of the United States. See generally *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-474 (9th Cir.) (description of legislative history), cert. denied, 464 U.S. 892 (1983).

The Act broadly authorizes the Attorney General to approve a new JOA if not more than one of the newspaper applicants is other than a "failing newspaper," and approval of a JOA "would effectuate the policy and purpose of this [Act]." 15 U.S.C. 1803(b).³ The Act defines "failing newspaper" as one that "regardless of its ownership or

² See, e.g., 116 Cong. Rec. 1783 (1970) (statement of Sen. Hruska); *id.* at 1785 (statement of Sen. Inouye); *id.* at 1788 (statement of Sen. Bennett); see also Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 Law & Soc. Order 3, 13-16 (describing the special economic characteristics of the newspaper industry); S. Openheim & C. Shields, *Newspapers and the Antitrust Laws* 5-6 (1981) (same).

³ The Act further provides that a JOA entered into before July 24, 1970 (the effective date of the statute) may remain in effect "if at the time at which such arrangement was first entered into, * * * not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication * * *." 15 U.S.C. 1803(a).

affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). Approval by the Attorney General confers only a limited exemption from federal antitrust laws. Newspapers entering into JOAs must maintain separate "editorial or reportorial staffs" and independent "editorial policies," 15 U.S.C. 1802(2), and may not engage in "any predatory pricing, any predatory practice, or any other conduct * * * which would be unlawful under any anti-trust law if engaged in by a single entity," 15 U.S.C. 1803(c). The Act, however, does permit newspapers to take joint action with regard to printing, time and method of publication, production, advertising and circulation rates, distribution and solicitation, and revenue distribution. 15 U.S.C. 1802(2).

B. The Administrative Proceedings Regarding the Application of the *Detroit Free Press* and *The Detroit News* for Approval of the Joint Operating Arrangement

1. In May 1986, the *Detroit Free Press* and *The Detroit News* filed an application with the Attorney General for approval to operate under a JOA. That application identified the *Free Press* as a paper that was in probable danger of financial failure.⁴ The proposed JOA provides that the *Free Press* will publish a weekday morning edition and the *News* will publish a separate weekday afternoon edition; one edition will be published on Saturday and Sunday, "with each paper assuming separate editorial and news responsibilities" (Pet. App. 115a (footnote omitted)). The two newspapers will maintain separate editorial and reportorial staffs, but will form a "partnership * * * which will control all business, commercial, and

⁴ Knight-Ridder, Inc., owns the *Free Press*; Gannett Co. owns the *News*. Those firms are the country's two largest newspaper groups. Pet. App. 150a.

production aspects of publishing" each newspaper (*id.* at 116a).

In July 1986, the Assistant Attorney General for the Antitrust Division recommended against approval of the proposed JOA at that time, but also suggested that the Attorney General convene an administrative hearing "to resolve the material issues of fact raised by the Application" (J.A. 93).⁵ The Attorney General accepted the recommendation, assigned the matter to an administrative law judge, and ordered the ALJ to conduct a hearing in order to develop the record in several specific areas.⁶ The Attorney General designated the major relevant newspaper unions and the Mayor of Detroit as intervenors in the proceedings. The two newspapers and the Assistant Attorney General for the Antitrust Division joined them

⁵ Under the Justice Department's regulations, an application for a JOA will be referred first to the Assistant Attorney General for the Antitrust Division. That official may recommend approving or rejecting the application. Alternatively, he may recommend that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If the Attorney General so orders, an administrative law judge conducts a hearing, at which the applicants, the Assistant Attorney General for the Antitrust Division, and other persons who properly intervene become parties to the administrative proceedings. 28 C.F.R. 48.10(b), 48.11. After the hearing, the administrative law judge makes recommendations to the Attorney General, who then issues the final agency decision concerning the JOA application. 28 C.F.R. 48.13(b). The Attorney General may not delegate his decisionmaking responsibility to the Assistant Attorney General for the Antitrust Division or to any other employee of the Antitrust Division. 28 C.F.R. 48.2(a).

⁶ The Attorney General directed the ALJ to examine seven issues: the relevance of economies of scale, the possible segmentation in the Detroit market, the effect of the Detroit economy's depressed state, the *Free Press's* financial history, the cause of the *News's* financial losses, the *Free Press's* expenses, and the *Free Press's* long-term prospects. Pet. App. 2a-3a.

as parties to the administrative hearing. Pet. App. 1a-3a, 150a-151a, 173a.⁷

2. The ALJ held a lengthy hearing and developed an extensive evidentiary record. The record shows that Detroit is the nation's fifth largest newspaper market, and that for almost three decades the *Free Press* and the *News* have competed fiercely to become the dominant paper (Pet. App. 15a, 119a, 139a). The competition escalated during the past 15 years; in 1976, for example, the *News* began publishing a morning edition in addition to its afternoon edition, thus challenging the *Free Press* head on. In order to gain an advantage in this direct competition, each newspaper invested millions of dollars in new printing facilities at a time when the Detroit metropolitan area was suffering an economic recession. Pet. App. 16a-18a.

This administrative record further indicates that the two papers competed strenuously not only to increase profits, but also to avoid the "irreversible downward spiral" that has claimed many "second" newspapers in metropolitan areas. Pet. App. 19a, 120a. Both papers sought to increase circulation and advertising in order to become the securely positioned "dominant paper" (*id.* at 139a). In part because this vigorous competition for readers and advertisers occurred during a period of economic recession in Detroit, the newspapers continued to charge comparatively low circulation and advertising prices. As a result, each paper suffered sizeable and persistent operating losses throughout the 1980s. The *Free Press's* losses, however, were greater. Between 1979 and 1986, the *Free Press* sustained

⁷ The Mayor and the unions originally opposed the JOA. After the *Free Press* management announced in January 1988 that it would be forced to close the newspaper if the JOA application were denied, they withdrew that opposition. See J.A. 126-139.

increasing operating losses amounting in total to \$81 million, and consistently trailed the *News* "in most circulation, revenue and [advertising] lineage measures" (Pet. App. 140a). Indeed, in 1986, the *News* generated \$61 million more in advertising revenue than did the *Free Press*. The *Free Press* also lost money from adopting market strategies aimed at improving its market position over the long term. Pet. App. 17a-19a, 139a-141a.

The administrative record also shows that, unlike the circumstances surrounding past JOA applications, the *Free Press* has not yet fallen into a "downward spiral" toward inevitable failure (Pet. App. 138a). Instead, the *Free Press* and the *News* are trapped in a stalemate—each paper shares the market, but each consistently sustains substantial losses in an effort to maintain its market share (with the *Free Press* bearing the brunt of those losses). Both newspapers could become profitable if they together raised prices and eliminated discounting. The antitrust laws, however, bar independent competitors, including newspapers, from taking such concerted action to raise their prices. Pet. App. 140a, 145a. Moreover, each paper reasonably fears that raising its prices unilaterally would shift readers and advertisers to the opposition. *Id.* at 87a-88a, 90a n.182; but see *id.* at 95a-98a. The record in fact confirms that in the Detroit market a small unilateral increase in price can cause an immediate and sizeable decrease in circulation. J.A. 202, 584; Exh. IX 198-Z8. In sum, the record shows that since neither paper can raise its prices without regard to the conduct of the other, neither one is in a position to take unilateral action to become profitable. Pet. App. 141a.

3. In December 1987, the ALJ recommended against approving the JOA, concluding that the newspapers had failed to prove that "losses * * * are traceable to an irreversible market condition which will probably lead to

domination and the downward spiral" (Pet. App. 129a). The ALJ noted the current stalemate, the precarious financial condition of the *Free Press*, the testimony of Alvah Chapman, the Chairman of Knight-Ridder, that he would recommend closing the *Free Press* if the JOA were denied, and the testimony of various Gannett officials that if the JOA were denied, the company would not jeopardize its circulation and advertising advantage by unilaterally raising prices at the *News*. The ALJ decided, nevertheless, that this evidence did not establish an irreversible trend towards market dominance by one of the newspapers. *Id.* at 130a-131a. In his view, "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies" (*id.* at 132a). Under those circumstances, he recommended that the "free market itself" should be permitted to take its course (*ibid.*).

4. On August 8, 1988, the Attorney General, having "accepted as accurate the fact findings of the Administrative Law Judge, but differ[ing] for the reasons stated with his ultimate conclusion as to where those facts lead" (Pet. App. 147a), approved the JOA. At the outset, the Attorney General expressly noted the "two overarching policy objectives" of the Newspaper Preservation Act: "[T]he more general pro-competitive objective of the antitrust laws, and the specific objective of preserving editorially and reportorially independent and competitive newspapers" (Pet. App. 144a (internal quotation marks and citation omitted)). He further explained that "Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly in any given market" (*id.* at 144a-145a).

The Attorney General recognized that to qualify for a JOA, at least one of the two newspapers had to be a "failing newspaper," which the statute defines as being in

"probable danger of financial failure." Pet. App. 140a-141a. Following his predecessor's decision,⁸ the Attorney General stated that this statutory standard "must be addressed as a matter of probabilities, not certainties" (*id.* at 141a (internal quotation marks and citation omitted)). And, agreeing with *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), cert. denied, 464 U.S. 892 (1983), the only court of appeals decision construing the Newspaper Preservation Act, the Attorney General made clear that although the "danger of financial failure" standard is less stringent than the "failing company" standard of *Citizen Publishing*, it is more exacting than the "not likely to remain or become financially sound" standard rejected by Congress during consideration of the Act. Pet. App. 142a.

The Attorney General recognized that the *Free Press* was sustaining mounting losses. Pet. App. 141a. Although acknowledging the absence of a "downward spiral," the Attorney General found that "it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (*id.* at 142a). "[W]ere it not for a major infusion of millions of dollars by its parent," the Attorney General stated, "there

⁸ See Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of Joint Operating Arrangement, 47 Fed. Reg. 26,472, 26,473 (1982) (Attorney General William French Smith).

The Attorney General also noted the formulation used in *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d at 478, where the court of appeals upheld Attorney General Smith's approval of the Seattle JOA: "[t]he probable danger standard is, by the plain meaning of the words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" (Pet. App. 142a (brackets in original)).

is every reason to assume that the *Free Press* would have failed long ago" (*id.* at 142a-143a).

Turning to the contention that both papers could become profitable simply by raising prices, the Attorney General noted first that the *Free Press* was already the more expensive paper in both circulation and advertising prices. Pet. App. 143a. The Attorney General explained that the two newspapers could become profitable only by a concerted price raise that, without the JOA, would be "entirely improper" (*id.* at 145a). He then observed that the owners of the *News* had testified that the newspaper would not raise its prices without joint action with the *Free Press*. Although the ALJ had questioned this testimony by Gannett officials, the Attorney General found that it "hardly reflects unsound business judgment" (*id.* at 143a). To the contrary, it would be reasonable for the *News* to hold to its current pricing strategy in order to maintain its circulation and advertising advantages over the *Free Press* (*id.* at 143a-144a, 147a).

The Attorney General also noted the testimony of the Chairman of Knight-Ridder (the firm that owns the *Free Press*) that he would recommend closing the newspaper if the JOA were denied. Although declining to attach "undue weight" to this testimony, the Attorney General recognized that it was a "prediction [that] cannot be wholly disregarded" (Pet. App. 144a). Since the *Free Press* had no unilateral means to extricate itself from its current loss position, the Attorney General determined that it "would be neither counterintuitive nor contradictory" for Knight-Ridder to close the *Free Press* (*ibid.*).⁹

⁹ The Attorney General observed that after the ALJ had issued his recommendation, Knight-Ridder had submitted information confirming that the company would close the *Free Press* if the JOA were not approved. Because this information was submitted after the record was closed, the Attorney General did not consider it. See J.A. 150 n.4 (this footnote was mistakenly omitted from the reprint of the Attorney General's opinion in the appendix to the petition for a writ of certiorari).

The Attorney General accordingly found that the *Free Press* had no reasonable prospect of emerging from its position of intractable losses, and that, absent the intervention of the JOA, Detroit would soon have only one editorial voice. Pet. App. 142a, 145a-146a. On this record, the Attorney General determined that "the danger of financial failure, if not imminent, certainly seems 'probable' " (*id.* at 141a), and thus concluded that the *Free Press* qualified as a "failing newspaper" (*id.* at 144a).

The Attorney General then turned to the question whether approval of the JOA would effectuate the policy and purpose of the Act. In that inquiry, he specifically considered whether the newspapers should be denied permission to work under the JOA because they "openly pursued the JOA option over several years and saw it as a means of avoiding financial failure" (Pet. App. 145a). He found that the marketing strategy adopted by the newspapers had been in place for nearly ten years, and that Knight-Ridder's heavy investment in the *Free Press* during that period "belies the notion that it was principally pursuing any end other than market domination" (*id.* at 146a). Furthermore, the Attorney General accepted the ALJ's finding that the *Free Press*'s situation has not resulted from "improper marketing practices or culpable mismanagement" (*id.* at 145a). The Attorney General thus determined that the current stalemated loss position was the result of "[k]eene competition aimed at market domination and future profitability — competition waged energetically but both responsibly and properly" (*ibid.*), and not the result of an improper quest for the safe harbor of a JOA.

Finally, the Attorney General concluded that the purposes of the Act would be served by approving the JOA because two independent editorial voices would be preserved in Detroit, "an outcome that does not appear to

be in the future otherwise" (Pet. App. 146a). Having determined that, on the record presented, the *Free Press* and the *News* had satisfied the statutory criteria, the Attorney General approved the application for the JOA.

C. The Decisions of the District Court and the Court of Appeals Upholding the Attorney General's Approval of the Joint Operating Arrangement

1. After the Attorney General rendered his decision, petitioners, who had not participated in the proceedings before the ALJ or the Attorney General, filed this action in the United States District Court for the District of Columbia, seeking judicial review of the Attorney General's decision under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* As a threshold matter, the district court held that the Attorney General's approval of the JOA must be reviewed under the "arbitrary and capricious standard" set forth in the APA (Pet. App. 153a). Under that standard of review, the court upheld the Attorney General's ruling that a newspaper need not show "the traditional downward spiral" in order to qualify as a "failing newspaper" under the Act (*id.* at 155a). Similarly, the court concluded that the Attorney General had "presented ample support * * * for his finding that the *Free Press* is both 'suffering losses which more than likely cannot be reversed' and is in 'probable danger of financial failure' " (*id.* at 156a).

The district court rejected petitioners' contentions that the Attorney General erred in concluding that the *News* would not raise its prices unilaterally if the JOA were denied, and that the Attorney General gave undue weight to testimony that the Chief Executive Officer of Knight-Ridder would recommend closing the *Free Press* under such circumstances. The court concluded that, on this

record, the Attorney General acted neither arbitrarily nor capriciously in determining that closing of the *Free Press* would be a logical course of action, given its substantial losses and market position. Pet. App. 157a-159a.

The court next turned to petitioners' argument that the newspapers' allegedly purposeful losses should have disqualified them from entering into a JOA. The court accepted the premise of petitioners' claim, but found that the losses in this case were primarily the result of each newspaper's independently seeking a secure, dominant position in the Detroit market (Pet. App. 159a-161a). The record showed that the prospect of a JOA at most played only a secondary role in the *Free Press*'s strategic decision-making. As the court stated, "[i]ndeed, [the facts found by the ALJ] suggest that the newspapers may have followed the same strategies had the JOA not been available" (*id.* at 161a). The court thus determined that the Attorney General had acted reasonably in refusing to disqualify the newspapers when the "losses are *primarily* the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail" (*id.* at 160a-161a).

Finally, the district court found no merit in petitioners' claim that the Attorney General's decision was internally inconsistent, holding that there can be no such conflict where the Attorney General had accepted only the ALJ's findings of fact, but not the inferences drawn from such facts (Pet. App. 161a-162a).

2. A divided panel of the court of appeals affirmed (Pet. App. 166a-197a). The court first determined that the meaning of the statutory standard "probable danger of financial failure" is "not apparent from the statute or the legislative history" (*id.* at 178a). The court thus decided that it should defer to the Attorney General's reasonable reading of that language, which had been taken from the

Ninth Circuit's self-described "commonsense construction" in *Committee for an Independent P-I v. Hearst Corp.*, *supra*, namely, "[i]s the newspaper suffering losses which more than likely cannot be reversed?" (704 F.2d at 478; see Pet. App. 175a, 178a-180a). The court acknowledged the "interpretive canon [of statutory construction] that exemptions to antitrust laws—like all exemptions—should be construed narrowly" (*id.* at 180a). But the court concluded that this aid to statutory construction should not be used to overturn a reasonable agency application of the Act to a particular set of facts (*id.* at 180a-181a).

The court of appeals then examined the Attorney General's decision and found it reasonable on the record presented. It accordingly upheld the Attorney General's conclusions that the *News* had achieved a competitive advantage, that the *News* would not likely ease competitive pressure on the *Free Press* by raising prices in the future if the JOA were denied, and that there was a significant probability that the *Free Press* would close in the absence of a JOA. Pet. App. 183a-189a. As the court stated, the Attorney General "obviously was concerned that if he gambled on the ALJ's prediction that both newspaper[s] were bluffing, Detroit would lose a newspaper" (*id.* at 187a).

Lastly, the court of appeals concluded that the Attorney General had sufficiently considered the potential problem that concerned the ALJ: that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing" in the form of an approved JOA (Pet. App. 189a). In the court's view, the Attorney General reasonably concluded that the present financial distress of the newspapers was the result of a long history of fierce competition, and that the prospect of a future JOA was neither an initial nor a

principal motivating factor.¹⁰ Thus, the court held that the Attorney General had acted reasonably in finding that market success was the principal goal of each newspaper, and that the approval of the JOA was therefore within the purposes of the Act. Pet. App. 189a-190a.¹¹

The court of appeals later denied a petition for rehearing and suggestion for rehearing en banc (Pet. App. 198a-199a).¹²

¹⁰ The court noted that the Attorney General had recognized that it would be impossible to preclude competing newspapers from factoring the prospect of a JOA into their business strategies (Pet. App. 189a). The court made clear, however, that there was no need to "consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA * * * [since the Attorney General reasonably concluded] that this record did not present such a situation" (*id.* at 190a n.13).

¹¹ Judge Ruth Bader Ginsburg dissented (Pet. App. 191a-197a), concluding that the matter should be remanded to the Attorney General for further explanation of the different standards governing approval of new and existing JOAs, and to address more precisely whether the two newspapers could actually become profitable on their own without the aid of a JOA.

¹² Chief Judge Wald and Judges Mikva, Edwards, and Ruth Bader Ginsburg dissented (Pet. App. 198a-199a). Chief Judge Wald, joined by Judges Mikva and Edwards, took issue with the Attorney General's conclusion concerning the likelihood that the *News* would unilaterally raise its prices if a JOA were denied (thereby allowing the *Free Press* to do the same) (*id.* at 205a-211a). According to the dissent, the Attorney General's conclusion was contrary to "[c]lassic economic principles" (*id.* at 207a), and continued low pricing by the *News* would be "perilously close" to prohibited predatory pricing (*id.* at 209a). The dissent therefore favored "perusal by an *en banc* court" (*ibid.*).

After rehearing was denied, petitioners filed an application for a stay of the Attorney General's decision pending the filing and disposition of a petition for a writ of certiorari. On March 3, 1989, the Chief Justice, sitting as Circuit Justice, denied the application for a stay. The next day, petitioners resubmitted the application to Justice Brennan, who granted a stay pending a further order by him or the Court. On March 20, the Court denied the application for a stay; Justices Blackmun and Stevens dissented. The *Free Press* and the *News* nevertheless determined that they would not immediately close the JOA

SUMMARY OF ARGUMENT

I. The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, by its terms establishes the framework guiding the Attorney General's consideration of an application for a joint operating arrangement. That framework requires the Attorney General to make two independent determinations: first, that at least one of the newspaper applicants is a "failing newspaper" (15 U.S.C. 1803(b)), which the Act specifically defines as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)); and second, that approval of the application "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)).

A. The first statutory criterion is "primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983). That standard does not require the Attorney General to consider additional non-economic policy factors such as whether granting a JOA would reward conduct contrary to the purpose of the Act or whether approval of the JOA would create a "roadmap" for other newspapers to follow. To the extent such non-economic policy factors inform the Attorney General's decision, Congress intended those factors to be taken into account at the second stage of the inquiry, namely, where the Attorney General determines whether approval of the application "would effectuate the policy and purpose" of the Act (15 U.S.C. 1803(b)).

B. Apart from the statutory prerequisite of a "failing newspaper," the Act calls for the Attorney General to make the discretionary and fact specific judgment whether approving a particular application for a JOA would further the "policy and purpose" of the Act. Specifically, the second statutory directive requires the Attorney General to

transaction. On May 1, this Court granted the petition for a writ of certiorari.

determine whether the proposed arrangement would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive" (15 U.S.C. 1801). Thus, he must not only weigh whether the JOA would preserve an independent source of news and commentary in the affected newspaper market; he must also consider the consequences of the JOA, such as its effect on otherwise open competition in that market.

II. A. Petitioners do not dispute the narrow scope of review applicable to the Attorney General's decisionmaking under the Newspaper Preservation Act — the "arbitrary and capricious" standard under the Administrative Procedure Act, 5 U.S.C. 706(2)(A). Under that standard, a reviewing court may not substitute its judgment for that of the congressionally designated decisionmaker; the court must determine only whether, within the statutory framework, there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This limited standard of review requires that the Attorney General's considered decision to approve the application for the JOA be sustained. On the record presented, petitioners have offered no sound basis for this Court to depart from its established practice of accepting the concurrent assessments of an administrative record by two lower courts. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

B. There can be no serious doubt that the Attorney General applied the proper statutory standard to determine whether the *Free Press* is a "failing newspaper" under the Newspaper Preservation Act. In applying this primarily economic standard, the Attorney General recognized that he must not only examine whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team.

Nor can it be credibly maintained that the Attorney General acted arbitrarily and capriciously in finding that the *Free Press* was in probable danger of financial failure. He found that "the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (Pet. App. 142a). The Attorney General noted that the *Free Press* could become profitable if the *News* raised its prices. But since both newspapers were determined to maintain their market share, the owners of the *News*, without the protection of a JOA with the *Free Press*, would rationally refuse to raise prices (an action which would jeopardize the paper's competitive advantage in circulation and advertising revenue). The Attorney General also considered whether a change in management could prevent the *Free Press*'s probable financial collapse. He found, however, that "given the market reality in Detroit under present circumstances," the best any management team could accomplish would be to "forestall the financial failure of the [*Free Press*], not prevent it altogether" (*id.* at 144a). Fully recognizing that the *Free Press* has no reasonable prospect of emerging from its position of incurring intractable substantial losses, the Attorney General properly determined that the newspaper satisfied the "failing newspaper" standard of the Act.

C. The second statutory directive, which petitioners do not seriously dispute, requires the Attorney General to weigh whether the JOA would preserve independent and competitive editorial voices in the affected newspaper market. Again, no serious claim can be made that the Attorney General acted in an arbitrary and capricious manner in determining, on the record presented, that the JOA between the *Free Press* and the *News* "would effectuate the policy and purpose" of the Newspaper Preservation Act.

Given that the *Free Press* is a "failing newspaper," and that the *Free Press*'s losses cannot be reversed except by an unlawful collaborative price increase with the *News*, the Attorney General reasonably concluded that "approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit—an outcome that does not appear to be in the future otherwise" (Pet. App. 146a). The Attorney General also expressly considered whether the business strategies or practices of the *Free Press* and the *News* should preclude approval of the JOA. Recognizing that a JOA should not be approved where the prospect of that safe harbor accounts for the newspaper's demise, the Attorney General explained that the *Free Press* was not brought to the "brink of financial failure through improper marketing practices or mismanagement," but rather by "[k]een competition aimed at market domination and future profitability" (*id.* at 145a). Furthermore, the prospect of obtaining a JOA has not fueled the newspapers' fierce competition. The Attorney General thus determined that neither the *Free Press* nor the *News* had adopted improper business strategies or practices that would call for rejecting their otherwise meritorious application for a JOA.

D. Petitioners, grasping at the fact that the *Free Press* lowered its prices while competing with the *News*, challenge the Attorney General's decision as inconsistent with the policy and purpose of the Act. However, petitioners' belated focus on this element of the record fails for several reasons.

First, the Attorney General expressly found that the price competition between the *Free Press* and the *News*, although fierce, was entirely legitimate and not the result of maneuvering to qualify for a JOA in the future. Second, contrary to petitioners' suggestion, the Attorney General's decision scarcely resembles a "roadmap" for

newspapers to follow to obtain JOAs by lowering their prices in order artificially to create losses and a competitive stalemate. Finally, petitioners' attack on the *Free Press*'s decision to cut prices flies in the face of Congress's assessment of the economic factors governing the newspaper industry.

III. A. Contrary to petitioners' broad contention, the court of appeals' decision upholding the Attorney General's approval of the JOA does not misapply the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the court of appeals discussed the application of the *Chevron* doctrine to this case, on consideration we do not believe that any *Chevron* issue is presented. In this case, the Attorney General simply set forth the terms of the Newspaper Preservation Act, noted with approval the common-sense interpretation given by the Ninth Circuit in *Hearst*, and then proceeded to apply the Act to the particular setting surrounding the Detroit newspaper market. In these circumstances, there has been no controverted interpretation of a statute by an administrative agency that calls for application of the *Chevron* framework.

B. Even if an issue regarding the proper interpretation of the Act were presented here, the Attorney General's sound construction of the statute, which was adopted from the Ninth Circuit's decision in *Hearst*, should be upheld. Petitioners suggest that a court should not defer to the Attorney General's decision because he "has no technical expertise in interpreting [the Newspaper Preservation Act]" (Br. 38). However, since the Attorney General merely adopted the construction initially offered by a court, that issue is not presented. In any event, as the court of appeals correctly recognized, *Chevron* is not based solely on agency expertise (Pet. App. 182a). As that decision makes clear, the doctrine of deference is also

based on the established principle that the political branches of the government should make policy choices. See 467 U.S. at 865-866.

Finally, petitioners claim that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to antitrust laws must be narrowly construed. That claim is irrelevant here; as even petitioners concede, the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so" (Br. 30).

ARGUMENT

THE ATTORNEY GENERAL'S APPROVAL OF THE APPLICATION FILED BY THE *DETROIT FREE PRESS* AND THE *DETROIT NEWS* FOR A JOINT OPERATING ARRANGEMENT IS FULLY CONSISTENT WITH THE STATUTORY REQUIREMENTS OF THE NEWSPAPER PRESERVATION ACT

I. The Newspaper Preservation Act Authorizes The Attorney General To Approve An Application For A Joint Operating Arrangement If At Least One Of The Newspaper Applicants Is A "Failing Newspaper" And Approval Of The Application Would "Effectuate The Policy And Purpose" Of The Act

The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, by its terms establishes the framework guiding the Attorney General's consideration of an application for a joint operating arrangement. That framework requires the Attorney General to make two independent determinations: first, that at least one of the newspaper applicants is a "failing newspaper" (15 U.S.C. 1803(b)), which the Act specifically defines as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)); and second, that approval of the application "would effectuate

the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). At each stage of the lengthy proceedings in this case, the reviewing authority has recognized this statutory standard and expressly applied it to the application filed by the *Detroit Free Press* and *The Detroit News*.¹³ Despite their scattershot attack on the Attorney General's approval of the JOA, petitioners' challenge boils down to a disagreement over the application of the established statutory standard to actions of the two newspapers and the particular facts of the Detroit newspaper market.

A. 1. The Act expressly defines a "failing newspaper" as one "which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)). As the Ninth Circuit has correctly observed, "[t]he probable danger standard is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d at 478. That standard, however, does not limit the Attorney General's focus to the so-called "bottom line" of a newspaper's financial statements. In addition, the Attorney General must scrutinize the performance of existing management in order to determine whether new ownership or management, without resorting to a JOA, could convert the newspaper into a profitable enterprise. In other words, in weighing whether a newspaper is failing, the Attorney General must not merely examine whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team. See *Hearst*, 704 F.2d at 478-479 & n.10.

¹³ See Pet. App. 119a (administrative law judge); *id.* at 136a-137a (Attorney General); *id.* at 152a-153a (district court); *id.* at 168a-169a (court of appeals).

2. Petitioners do not seriously dispute this straightforward definition of the "failing newspaper" standard of the Act. Petitioners do appear to suggest (Br. 25-28) that the Attorney General must interpret that standard to include *additional* non-economic policy factors, such as whether granting a JOA would reward conduct contrary to the purpose of the Act or whether approval of the JOA would create a "roadmap" for other newspapers to follow (Br. 25). This suggestion, however, is inappropriate for two reasons.

First, any attempt to engraft additional elements onto the "failing newspaper" standard (as opposed to providing content to the second statutory requirement under 15 U.S.C. 1803(b)) ignores the fact that Congress, after debating several possible standards, specifically defined the term "failing newspaper" as a newspaper in "probable danger of financial failure." Indeed, petitioners themselves, in recounting the pertinent legislative history (Br. 16-19), concede that Congress wrestled with the question of an appropriate standard and ultimately adopted a definition of failing newspaper less stringent than that used by this Court in *Citizens Publishing*, but more exacting than other proposed standards. Where Congress has specifically considered alternative definitions and has settled on a statutory definition solely in economic terms, it would be inappropriate for a court to impose other, non-economic factors onto that definition.¹⁴

¹⁴ Petitioners suggest in passing (Br. 19-20) that the "failure" standard embodied in the Bank Merger Act, 12 U.S.C. 1828(c)(5)(B), which this Court construed in *United States v. Third National Bank*, 390 U.S. 171 (1968), should be the benchmark for the Newspaper Preservation Act's "probable danger of financial failure" standard. To be sure, as petitioners point out (Br. 19), Congress did refer to the Bank Merger Act and *Third National Bank* in the legislative history of the Newspaper Preservation Act. The failing newspaper standard

Second, to the extent that such non-economic policy factors inform the Attorney General's decision, Congress clearly intended these factors to be taken into account at

ultimately enacted into law, however, is quite different from the bank merger standard. Under the terms of the Newspaper Preservation Act, the Attorney General must undertake two separate inquiries; first, the economic determination of whether the newspaper is in probable danger of financial failure; and second, the discretionary policy judgment of whether the joint operating arrangement will effectuate the policy and purpose of the Act. In contrast, the Bank Merger Act requires a balancing of the anticompetitive effects of the proposed merger against the particular needs of the affected community. Under the latter statutory scheme, if there is sufficient "public interest," a bank merger could be approved even if neither of the merging banks is failing. See 12 U.S.C. 1828(c)(5)(B). Indeed, the "probable failure" language in the Bank Merger Act relates only to whether the agency can waive certain notice and waiting periods. 12 U.S.C. 1828(c)(3), (4) and (6). Accordingly, as commentators have observed, "the fact that Congress provided for exemptions to the antitrust laws in two different industries does not imply the same test should be applied * * * particularly when neither the industries nor the standards articulated by the Acts bear the slightest resemblance to each other." Martel & Haydel, *Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages*, 1984 B.Y.U. L. Rev. 123, 164.

In any event, the issue petitioners appear to raise is not presented by this case. Petitioners themselves acknowledge (Br. 19-20) that the Antitrust Division has referred to *Third National Bank* in ruling on JOAs (see, e.g., J.A. 146-147), that the ALJ did so in this case (Pet. App. 125a-126a), and that the Ninth Circuit considered that standard in *Hearst*, 704 F.2d at 476. Here, the Attorney General specifically agreed with and followed *Hearst*, and thus took into account *Third National Bank*. Pet. App. 142a. Moreover, to the extent that "[t]he *Third National Bank* standard required [the] Attorney General * * * to look behind the losses that the Free Press had suffered and to consider whether the losses were caused by mismanagement and whether there were reasonable alternatives to the JOA that could avoid the necessity of joint operation" (Pet. Br. 20), the record shows quite clearly that the Attorney General did so. See Pet. App. 142a-146a.

the second stage of the inquiry, namely, where the Attorney General determines whether approval of the application "would effectuate the policy and purpose" of the Act (15 U.S.C. 1803(b)). We fully agree with petitioners that the Attorney General must not "reward" newspapers that purposefully suffer substantial losses over the short term in order to obtain a potentially lucrative JOA in the long term. This factor, however, is appropriately considered by the Attorney General at the second stage of the statutory determination, *after* he has concluded that at least one of the newspaper applicants is in probable danger of financial failure.

B. Apart from the statutory prerequisite of one or more "failing newspapers," the Newspaper Preservation Act calls for the Attorney General to conclude that approval of the application for a joint operating arrangement "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). Under 15 U.S.C. 1801, entitled "Congressional declaration of policy," Congress stated broadly that, in the interest of maintaining an independent and competitive press, it is the public policy of the United States to preserve newspapers in "economic distress" by allowing joint operating arrangements "in accordance with the provisions of this [Act]." This second inquiry under the Act thus calls for the Attorney General to take into account a number of policy factors, including whether approving a JOA would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States" (15 U.S.C. 1801).¹⁵

¹⁵ Petitioners suggest (Br. 38) that the Attorney General's inquiry at the second stage is mechanical, because the Act expressly defines its "policy" in 15 U.S.C. 1801. But the broad declaration of policy contained in Section 1801 hardly lends itself to any such perfunctory application. Moreover, petitioners themselves recognize (Br. 25-28) that

Given this broad statutory mandate, Congress deliberately vested one governmental official, the Attorney General, with the responsibility of undertaking the discretionary and fact specific judgment of whether approving a particular application for a JOA would further the goals of the Act. Accordingly, the statutory directive requires the Attorney General, in passing on an application for a JOA, to undertake a careful policy determination. He must not only weigh whether the JOA would preserve an independent source of news and commentary in the affected newspaper market; he must also consider the consequences of the JOA, such as its effect on otherwise open competition in that market.

II. The Attorney General, Applying The Statutory Standards For Approval Of A JOA, Properly Determined That The *Detroit Free Press* Is A Failing Newspaper And That The Proposed JOA "Would Effectuate The Policy And Purpose" Of The Newspaper Preservation Act

A. In enacting the Newspaper Preservation Act, Congress did not include a provision for judicial review of the Attorney General's decision either to approve or disapprove an application for a JOA. See S. Rep. No. 535, *supra*, at 7. As a result, judicial review of that decision is available only under the Administrative Procedure Act. As both the district court and court of appeals correctly concluded, since the Newspaper Preservation Act itself does not require a hearing, the "substantial evidence" test does not apply. 5 U.S.C. 706(2)(E); *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); see Pet.

certain factors not enumerated in the statute, such as whether approval of the JOA would create a "roadmap" for future newspapers to follow, should be taken into account before the Attorney General approves a JOA.

App. 153a, 176a-177a & n.6. Accordingly, as the lower courts held, the Attorney General's decision is subject only to review under the "arbitrary and capricious" standard, 5 U.S.C. 706(2)(A). Pet. App. 153a, 176a-177a & n.6.

The arbitrary and capricious standard is especially appropriate where, as here, the decisionmaker must weigh competing statutory commands in making his policy determination. Under that standard, the challenged decision must be upheld unless it conflicts with the statute itself or is arbitrary and irrational. 5 U.S.C. 706(2)(A). In other words, a reviewing court may not substitute its judgment for that of the congressionally designated decisionmaker; the court must determine only whether, within the statutory framework, there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And the decision must be upheld if it " 'was based on a consideration of the relevant factors and [does not amount to] a clear error of judgment * * *.' " *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

Moreover, this Court has long held that the responsibility for assessing a record to determine whether an agency's decision is reasonable lies primarily with the lower courts. See, e.g., *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). Thus, in *Universal Camera* the Court made clear that it "will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied" (340 U.S. at 491). That prudential principle should apply a fortiori to instances where both the district court and the court of appeals concur in sustaining the agency's decision

under the more deferential arbitrary and capricious standard. On the record presented, petitioners have offered no sound basis for this Court to depart from its practice of accepting the concurrent assessments of an administrative record by two lower courts.

B. 1. There can be no serious doubt that the Attorney General applied the proper statutory standard to determine whether the *Free Press* is a "failing newspaper" under the Newspaper Preservation Act. Not only did the Attorney General explicitly cite and apply the specific statutory language that the newspaper must be "in 'probable danger of financial failure' " (Pet. App. 140a-141a, quoting 15 U.S.C. 1802(5)), he also agreed with the formulation adopted by the Ninth Circuit in *Hearst*, 704 F.2d at 478 (Pet. App. 142a). Accordingly, in applying this primarily economic standard, the Attorney General recognized that, in weighing whether a newspaper is failing, he must examine not only whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team. See *Hearst*, 704 F.2d at 478-479 n.10; Pet. App. 142a-144a.¹⁶

¹⁶ Petitioners take pains to point out that the "probable danger of financial failure" standard is stricter than the "[un]likely to remain or become a financially sound publication" standard rejected by Congress. See Br. 16-19. Petitioners' observation, although entirely accurate, is beside the point precisely because it has never been a matter of dispute. Indeed, the Attorney General expressly agreed with that proposition and, following the statutory language, applied the more stringent test, namely, requiring the newspapers to show that the failure of the *Free Press* is "probable". See Pet. App. 142a, 144a.

To the extent petitioners implicitly criticize the Attorney General for not explaining the difference between the "probable danger of financial failure standard" that governs a new JOA application and the less stringent "[un]likely to remain or become a financially sound" standard that governs an application to continue an existing JOA (15

2. Nor can it be credibly maintained that the Attorney General acted arbitrarily and capriciously in finding that the *Free Press* was in probable danger of financial failure. Pet. App. 141a, 143a, 147a. The Attorney General found that "the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (Pet. App. 142a). Although a concerted price increase could save the *Free Press*, the Attorney General recognized that the *Free Press* actually has no means to "reverse the unbroken pattern of annual operating losses" (*id.* at 145a), because a collaborative price raise with the *News* would be illegal without the JOA.

Similarly, the Attorney General noted that the *Free Press* could become profitable if the *News* itself raised prices. Based on the record testimony,¹⁷ however, the Attorney General determined that since both newspapers were determined to preserve their respective market shares, the owners of the *News*, without the protection of a JOA with the *Free Press*, would rationally refuse to raise prices (an action which would jeopardize the paper's competitive advantage in circulation and advertising revenue). Pet. App. 143a-144a, 147a; see *id.* at 187a. Indeed, a unilateral price increase would drive down the newspaper's circulation and profits since the Detroit newspaper market is unusually price sensitive. See J.A. 202, 307-308, 584; Exh. IX 198-Z8.

U.S.C. 1803(a)), that charge is irrelevant. This case involved an application for a new JOA. On this record, therefore, the Attorney General had no occasion to issue an advisory opinion regarding the standards applicable for continuation of an existing JOA.

¹⁷ See, e.g., J.A. 238-239 (testimony of Alen Neuarth, the Chief Executive Officer of Gannett); J.A. 347 (testimony of Robert Nelson, a Gannett official).

Finally, the Attorney General considered whether a change in management could prevent the *Free Press's* probable financial collapse. But not even petitioners have suggested that the *Free Press* could fare better with different management. Indeed, the Attorney General specifically found that, given "the market reality in Detroit under present circumstances," the best any management team could accomplish would be to "forestall the financial failure of the [*Free Press*], not prevent it altogether" (Pet. App. 144a).

In sum, the Attorney General correctly found that the facts surrounding the Detroit newspaper market paint a vivid picture of a newspaper, the *Free Press*, whose demise "is not just speculative, or likely, but indeed 'probable'" (Pet. App. 144a).¹⁸ The Attorney General recognized that the *Free Press* has no reasonable prospect of emerging

¹⁸ Petitioners contend (Br. 23) that since the proposed JOA contains a "50/50 profit split" between the two newspapers, that fact alone is "persuasive evidence" that the *Free Press* is not "in probable danger of financial failure." That assertion ignores both the facts of this case and the governing legal standard. First, the parties' agreement to share profits reflected their recognition that the *Free Press's* corporate parent, Knight-Ridder, had the financial resources and the competitive will to continue publishing the *Free Press*, and thus effectively to force the *News* to sustain its own losses. See J.A. 228-229, 421, 443, 444. Second, petitioners' argument harkens back to the analysis used in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-138 (1969). In that decision, the Court stated that since a competitor's willingness to enter into an agreement that splits future profits shows that the newspaper is not on "the brink of collapse," that newspaper does not qualify as a "failing company." In enacting the Newspaper Preservation Act, however, Congress specifically jettisoned the *Citizen Publishing* approach. See, e.g., S. Rep. No. 535, 91st Cong., 1st Sess. 4-5 (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3 (1970). Even petitioners' recitation of the pertinent legislative history concedes as much. See Br. 15-16. Accordingly, petitioners' attempt to resurrect the approach rejected by Congress must fail.

from its current position of intractable and substantial losses. He thus properly determined that the newspaper satisfied the "failing newspaper" standard of the Act.

C. 1. The Newspaper Preservation Act also calls for the Attorney General, before approving an application for a joint operating arrangement, to make the discretionary and fact-specific judgment of whether the particular application "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). Before this Court, petitioners do not seriously dispute the content of this inquiry. See Br. 18-19, 25-28. Indeed, petitioners do not expressly disagree with the Attorney General's description of the statutory standard:

Undergirding the Act are two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving "editorially and reportorially independent and competitive" newspapers (15 U.S.C. 1801). Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly in any given market. The alternative of a JOA is in the nature of a legislative trade-off: an incremental elimination of competition as to the newspapers' production activities in exchange for the assurance that the existing array of editorial and reporting voices will remain fiercely competitive and independent.

Pet. App. 144a-145a.

2. Again, no serious claim can be made that the Attorney General acted in an arbitrary and capricious manner in determining, on the record presented, that the JOA between the *Free Press* and the *News* "would effectuate the policy and purpose" of the Newspaper Preservation Act. Given that the *Free Press* is a "failing newspaper," and that the *Free Press's* losses cannot be reversed except by an

unlawful collaborative price increase with the *News*, the Attorney General reasonably concluded that "approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit—an outcome that does not appear to be in the future otherwise" (Pet. App. 146a); see *id.* at 145a.

In making this determination, the Attorney General expressly considered whether the business strategies or practices of the *Free Press* and the *News* should preclude approval of the JOA. He recognized (anticipating petitioners' concern (*e.g.*, Br. 25)) that a JOA should not be approved where the prospect of that safe harbor accounts for the newspaper's demise. Pet. App. 146a. He nevertheless declined to announce any sweeping rule to govern such a case, because this record "offers a much different picture" (*ibid.*).¹⁹ The Attorney General explained that the *Free Press* was not brought to the "brink of financial failure through improper marketing practices or culpable mismanagement," but rather by "[k]eene competition aimed at market domination and future profitability" (*id.* at 145a). Furthermore, the prospect of obtaining a JOA had not fueled the newspapers' fierce competition. The Attorney General stated that the competitive strategies followed by both newspapers for almost a decade and "the heavy expenditure of investment capital by Knight-Ridder [owner of the *Free Press*] over that period of time belie[] the notion" that the newspapers were pursuing any end other than a stable, dominant, profitable position in the Detroit market (*id.* at 146a).²⁰ And the Attorney General

¹⁹ The court of appeals agreed that the Attorney General reasonably concluded that this case does not present "the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA" (Pet. App. 190a n.13). See also *id.* at 160a-161a.

²⁰ The record makes clear that the *Free Press* and the *News* have been intense rivals battling over the Detroit market for almost 30

specifically found that only when the *Free Press* and the *News* found themselves caught in a “no win” stalemate did they look to the JOA as an available option (*ibid.*).²¹

D. Petitioners, grasping at the fact that the *Free Press* lowered its prices while competing with the *News*, challenge the Attorney General’s decision as inconsistent with the policy and purpose of the Newspaper Preservation Act. In particular, petitioners apparently assert (Br. 27) that, if the JOA had not been in the offing, the *Free Press* would not have cut prices as part of its effort to achieve market dominance. According to petitioners, since rational firms purportedly do not price below their competitors, the Attorney General’s approval of the JOA where the failing newspaper lowered its prices amounts to a “reward or encourage[ment of] such behavior” inconsistent with the Act itself (Br. 27). Petitioners’ belated focus on this element of the record, however, although couched in terms of a legal dispute, is nothing more than either a thinly veiled challenge to the factual findings made below, or an attack on the findings about the unique economic characteristics of the newspaper industry that motivated Congress to enact the Newspaper Preservation Act.

years — rivals that have escalated the level of competition in the last 15 years. In 1976, for example, the *News* began publishing a morning edition in addition to its afternoon edition, thus tackling the *Free Press* head on. Once this direct competition began, both newspapers invested millions of dollars in new printing facilities in order to gain an advantage. These actions, in turn, spurred further heated competition for increased circulation. Pet. App. 15a-18a.

²¹ As the Attorney General explained, the newspapers reasonably recognized that a JOA was an available option after realizing that they were in a competitive stalemate with market dominance “no longer within the grasp of either paper” (Pet. App. 146a). At that stage, there was nothing improper about considering a JOA, since newspapers “cannot be faulted for considering and acting upon an alternative that Congress has created” (*ibid.*).

1. As we have explained (see pp. 34-36, *supra*), the Attorney General expressly found that the competition between the *Free Press* and the *News*, although fierce, was entirely legitimate and not the result of maneuvering to qualify for a JOA in the future. See Pet. App. 145a-146a. Those factual findings are amply supported by the record. Cf. *United States v. Doe*, 465 U.S. 605, 614 (1984).

Moreover, contrary to petitioners’ suggestion (Br. 25-26), the Attorney General’s decision scarcely resembles a “roadmap” for newspapers to follow to obtain JOAs by encouraging papers to lower their prices in order artificially to create losses and a competitive stalemate. The Attorney General determined that the *Free Press* and the *News* had engaged in legitimate competition to achieve market dominance, not the consolation prize of a JOA, and that the newspapers considered the JOA as an alternative only *after* they became locked into a loss stalemate. Pet. App. 146a.²² As the court of appeals correctly observed, this case does not involve the situation where the “initial and principal motivating factor behind a price war

²² Petitioners claim that the Attorney General found that the *Free Press* had no unilateral means of breaking the stalemate “as long as the *News* was willing to continue to incur heavy losses” (Br. 25). That claim misreads the Attorney General’s decision. He specifically determined that the *Free Press* could become profitable only through a collusive or collaborative price raise — an action that would be entirely improper without a JOA (Pet. App. 143a, 145a). The record shows that a unilateral price increase by either the *Free Press* or the *News* could cause the newspaper to lose circulation to its rival, and perhaps even lose revenue. *Id.* at 87a-88a (the *News* did not follow the *Free Press*’s 1979 price increase “because it fears loss of the circulation lead if the papers sold at the same price”); see *id.* at 90a n.182 (“it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses including perhaps discounts off the increased circulation price”).

is the prospect of a future JOA" (*id.* at 190a n.13). For that reason alone, no rational newspaper could reasonably rely on the Attorney General's decision as a guarantee that he would approve a JOA after the paper intentionally pursued that goal.²³

Furthermore, the setting of the Attorney General's decision—the Detroit newspaper market—has its own particular characteristics that are not likely to be replicated elsewhere. The circulation rates of both the *Free Press* and the *News* are apparently highly price sensitive. This factor may result in part from weak consumer loyalty to either paper—almost 40% of each newspaper's regular readership also reads the competition's paper on a regular basis. Pet. App. 35a, 89a, 103a n.238; J.A. 584.²⁴ In addition, the record shows that the *Free Press* and the *News* waged their battle for market dominance at a time when the Detroit economy was falling deeply into recession. While the newspapers were competing for market share, consumers therefore had less disposable income to spend and Detroit's businesses, in turn, were spending fewer dollars on advertising. Pet. App. 14a-18a. In these circumstances, reducing prices was in fact a rational means for the newspapers to increase circulation and attract more advertisers.

The record offers no basis for assuming that these peculiar circumstances exist in other cities. Accordingly,

²³ Should a newspaper, motivated by the prospect of obtaining a JOA, deliberately cut its prices to generate short-term losses, approval of the application for a JOA presumably would not further the policy or purpose of the Newspaper Preservation Act.

²⁴ Such "duplicate" readers are apt to be more sensitive to price changes than "exclusive" readers. Testimony in the record suggests that a 25-cent per week price increase would cause the *Free Press* to lose almost 40% of its duplicate readers. See Exh. IX 198H-198I.

the assertion that newspapers in market areas without Detroit's particular characteristics either could duplicate the stalemate the *Free Press* and the *News* face or would be tempted to risk millions of dollars to try to do so, blinks reality.²⁵ To the extent petitioners' "roadmap" metaphor is even apt, the Attorney General's decision would not lead inevitably to a JOA, but much more probably to a dead end.

2. Petitioners' attack on the *Free Press*'s decision to cut prices also flies in the face of Congress's assessment of the economic factors governing the newspaper industry. Congress recognized that newspapers have engaged and will continue to engage in legitimate fierce competition of the sort that led to the *Free Press*'s financial woes. Congress accordingly determined that the unique economic factors of the newspaper industry require the safety net of a JOA in appropriate instances. See H.R. Rep. No. 1193, *supra*, at 3 (JOAs are necessary because "vigorous competition" has often resulted in newspapers' financial failure); S. Rep. No. 535, *supra*, at 3-4 ("Allowing newspapers in competitive financial difficulty to work out agreements with a healthy newspaper * * * will give the newspaper under competitive pressure the financial security and stability necessary for independent behavior.").

²⁵ Indeed, we seriously doubt whether other newspapers could ever replicate the material factors supporting the Attorney General's decision to approve the JOA here, which include the following: the failing newspaper's sustained and mounting losses for a period of seven years (Pet. App. 141a); the rival newspaper's significant competitive advantage in circulation and advertising (*id.* at 141a-142a); the history of nearly 30 years of intense competition (*id.* at 15a); the relevant market that prevents the failing newspaper from becoming profitable by raising its prices (*id.* at 141a-142a); and legitimate fierce competition during an economic recession (*id.* at 18a).

"[T]he economic mainstay of the newspaper business," as this Court has noted, is not circulation, but advertising. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 604 (1953). In fact, 70 to 75% of the typical newspaper's revenue derives from advertising revenue; circulation revenues generally ranks even below revenue from classified advertisements. See S. Oppenheim & C. Shields, *Newspapers and the Antitrust Laws* 5 (1981).²⁶ As a result, newspaper publishers are primarily concerned with maintaining a profitable flow of advertising revenue. See *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1362-1364 (N.D. Cal. 1974), modified, 401 F. Supp. 1374 (N.D. Cal. 1975), aff'd in part and rev'd in part, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

Moreover, given that circulation price affects the demand for newspapers and the number of papers sold, "an increase in the subscription price may ultimately reduce the publisher's profits." *Knutson*, 383 F. Supp. at 1363-1364.²⁷ Here, the *Free Press* and the *News*

²⁶ The administrative record in this case shows that advertising revenue accounts for 72% of the *Free Press*'s total revenues and 81% of the *News*'s total revenues. Pet. App. 58a.

²⁷ As explained in the *Knutson* decision, 383 F. Supp. at 1363:

Circulation, and hence the newspaper's rate of penetration, may vary with the subscription price of the newspaper. Circulation generally will decrease after an increase in the subscription price unless the publisher or someone else reallocates his resources in order to influence or control such a result, for example, by increasing expenditures for the solicitation of new subscriptions or increasing the quality of the product. Assuming that such a reallocation cannot be profitably undertaken or that it is ineffective, circulation will decline when the subscription price increases and advertising demand will therefore decline resulting in a reduction of the advertising space carried by the newspaper. This reduction will make the newspaper less desirable to subscribers which in turn will decrease circulation and lead to a further loss of advertising demand.

reasonably feared that unilaterally raising their prices would adversely affect circulation, and thus decrease advertising revenue. Pet. App. 87a-88a, 90a n.182; J.A. 202, 307-308, 584; Exh. IX 198-Z8. On the other hand, a newspaper might quite reasonably lower its circulation price to drive up circulation, or lower advertising rates to attract new business, and thus increase advertising revenue and long-term profits. Such a strategy can be economically sound given the interrelationship between circulation and advertising revenue.

There is an additional compelling reason that may justify the newspaper's price cuts. While up and down swings are the usual fare in other businesses, for a newspaper even a small downturn can snowball into an irreversible slide ultimately leading to ruin:

Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper short on advertising, so circulation drops even further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure.

Pet. App. 171a.²⁸ This "downward spiral" syndrome has claimed literally hundreds of newspapers, with the result that most cities in the United States are served only by one newspaper.²⁹ Given this pattern endemic to the industry, it is economically rational for a publisher to try to avoid the downward spiral by entrenching his paper as the stable dominant newspaper in the city. This concern explains

²⁸ See S. Rep. No. 535, *supra*, at 4 ("the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses; * * * when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer").

²⁹ See E. Hynds, *supra*, at 139; S. Oppenheim & C. Shields, *supra*, at 6-7; Martel & Haydel, *supra*, 1984 B.Y.U. L. Rev. at 128-130.

precisely why the two Detroit newspapers were battling so fiercely. Pet. App. 19a; J.A. 212, 405, 510. By lowering prices, the *Free Press* sought to increase circulation and advertising in order to avoid becoming the junior newspaper susceptible to the downward slide. The paper was well aware of the recent failures of the junior newspapers in Baltimore, Washington, D.C., Buffalo, Cleveland, and Philadelphia, and was attempting to entrench its market position in order to avoid a similar fate. See, e.g., Pet. App. 99a; J.A. 212.

In sum, the Attorney General properly determined that the fact that the *Free Press* lowered its prices as part of its fierce competition for market dominance should not preclude it from securing a JOA.

III. Because The Attorney General Properly Applied The Statutory Framework Of The Newspaper Preservation Act To The Particular Facts Of The Detroit Market, No *Chevron* Issue Is Presented

Petitioners broadly contend (Br. 29-39) that the court of appeals' decision misapplied the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requiring courts to defer to an agency's reasonable interpretation of a statute Congress has entrusted it to administer. That argument is wide of the mark for several reasons.

A. Although it is true that the court of appeals discussed the application of the *Chevron* doctrine to this case, on consideration we do not believe that any *Chevron* issue is in fact presented. This Court's decision in *Chevron* sets forth a framework for judicial review of disputes concerning an agency's construction of the meaning of a statute that it is charged with administering. *Chevron*, 467 U.S. at 842-844; see, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). As we have shown above, however,

although petitioners quarrel with the Attorney General's decision, they do not object to any material interpretation of the Newspaper Preservation Act adopted by the Attorney General. Nor could they, for the Attorney General did not purport to adopt a new construction of the statute. He simply set forth the terms of the Act, noted with approval the common-sense interpretation given by the Ninth Circuit in *Hearst*, 704 F.2d at 478, and then proceeded to apply the Act to the particular situation in the Detroit newspaper market. In these circumstances, there has been no controverted interpretation of a statute by an administrative agency that calls for application of the *Chevron* framework.

B. Even if an issue regarding the proper interpretation of the Newspaper Preservation Act were presented here, the Attorney General's sound construction of the statute, which was adopted from the Ninth Circuit's decision in *Hearst*, should be upheld. Petitioners suggest that a court should not defer to the Attorney General's decision because he "has no technical expertise in interpreting [the Newspaper Preservation Act]" (Br. 38). Again, however, this issue is not presented, since the Attorney General merely adopted the construction initially offered by a court. In any event, as the court of appeals correctly recognized, *Chevron* is not based solely on agency expertise (Pet. App. 182a). As that decision makes clear, the doctrine of deference is also based on the established principle that the political branches of government, rather than the courts, should make policy choices. See 467 U.S. at 865-866. Congress may decide which agency or official within the Executive Branch should be responsible for implementing particular legislation and resolving conflicting policies within a statutory framework. If the Attorney General's decision "represents a reasonable accommoda-

tion of conflicting policies that were committed to [his] * * * care by statute, * * * [it should not be disturbed] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845; see Pet. App. 181a.

Here, Congress vested responsibility for ascertaining whether a newspaper is "failing" and certain policy determinations on the shoulders of the Attorney General—a Cabinet official who, with access to all the resources of the Department of Justice, is fully capable of discharging that duty. Consequently, there is no basis for petitioners' suggestion that this Court should try to second-guess Congress's considered decision and examine the designated administrative decisionmaker's credentials before accepting his reasonable decision.

Finally, petitioners err in claiming (Br. 29-33) that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to the antitrust laws must be narrowly construed. As petitioners concede, the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so" (Br. 30). Indeed, the Attorney General explicitly adopted the reading of the Newspaper Preservation Act set forth by the Ninth Circuit in *Hearst*, 704 F.2d at 473, which specifically stated that courts and the Attorney General, in applying the Act, must be guided by the canon of construction governing application of the antitrust laws. See Pet. App. 141a-142a. In any event, as is the case with other canons of statutory construction, that maxim does not dictate the outcome of a particular application of a statute to the record presented. The court of appeals did not ignore the maxim; it only recognized that

this canon of construction did not compel the Attorney General to reach a different result.³⁰

³⁰ As this Court has made clear, the first stage of the *Chevron* framework requires a reviewing court to determine "whether Congress has spoken directly to the precise question at issue." *Chevron*, 467 U.S. at 842. This question must be answered by "employing traditional tools of statutory construction." *Id.* at 842 n.9; see *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987). Thus, as the court of appeals here correctly recognized, courts should and often do use canons of construction as intrinsic aids at the first stage of the *Chevron* analysis, insofar as those canons assist in the process of discerning congressional intent. Pet. App. 180a-181a.

At the second stage of the *Chevron* framework, where a reviewing court determines whether the agency has adopted a reasonable interpretation of an otherwise ambiguous statute, we believe somewhat greater caution in relying on canons would be in order. As the court of appeals observed, "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes" (Pet. App. 180a (emphasis in original)). However, since it is undisputed that the Attorney General applied the pertinent canon in construing the Newspaper Preservation Act, and both the district court and the court of appeals accepted his reasonable and uncontroverted interpretation, this case presents no occasion to address the role of canons of construction at the second stage of the *Chevron* framework.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

DOUGLAS LETTER —
ROBERT M. LOEB
Attorneys

AUGUST 1989

* The Solicitor General is disqualified in this case.

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether it was arbitrary or capricious for the Attorney General to determine that the Detroit Free Press was in probable danger of financial failure, and that preservation of its news and editorial voice through a joint operating arrangement would effectuate the policy and purpose of the Newspaper Preservation Act, where the record evidence showed that the Detroit Free Press:

- had sustained increasing operating losses totalling \$83 million between 1979 and 1986;
- would have failed long ago without cash infusions of \$176 million from its corporate parent;
- struggled unsuccessfully for more than a decade to overcome the commercial dominance of its rival, The Detroit News;
- trailed The Detroit News significantly in advertising, circulation, and revenue;
- could pursue no unilateral business strategy that would return it to profitability;
- had engaged at all times in proper marketing and managerial practices; and
- would go out of business if a joint operating arrangement with The Detroit News were denied.

STATEMENT PURSUANT TO RULE 28.1

Detroit Free Press, Incorporated is a wholly-owned subsidiary of Knight-Ridder, Inc. It has no subsidiaries other than wholly-owned subsidiaries. Its affiliates (excluding wholly-owned subsidiaries of Knight-Ridder, Inc.) are the following: the Seattle Times Company; Southeast Paper Manufacturing Company; Ponderay Newsprint Company; TKR Cable Company; SCI Holdings, Inc.; SCI Cable Partners; Knight-Ridder Tribune News Services; Fort Wayne Newspapers, Inc.; and Fort Wayne Newspaper Agency.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
A. Introduction	1
B. Competition In The Newspaper Industry	3
C. Enactment Of The Newspaper Preservation Act	7
D. History Of The Detroit Newspaper War	9
1. The Competitive Battle: Dominance Equals Survival	9
2. Knight-Ridder's Efforts To Obtain A JOA	12
E. Proceedings Before The Attorney General ..	14
F. Affirmance By The District Court	18
G. Affirmance By The Court Of Appeals ..	19
SUMMARY OF ARGUMENT	21
ARGUMENT	23
THE ATTORNEY GENERAL'S APPROVAL OF THE JOINT OPERATING ARRANGEMENT SHOULD BE AFFIRMED BECAUSE IT CONSTITUTES A REASONABLE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE	23
A. The Attorney General's Determinations Under The Act May Not Be Set Aside Unless They Are Shown To Be Arbitrary Or Capricious	24

	<u>PAGE</u>
B. The Attorney General's Decision Is Consistent With The Language, Legislative History And Purpose Of The Newspaper Preservation Act	27
1. The Attorney General's findings and predictions are amply supported by the record	27
2. The Attorney General's Determinations plainly satisfy the standards of the NPA	33
C. Petitioners Have Failed To Identify Any Defect In The Attorney General's Legal Analysis	39
1. This case presents no conflict between <i>Chevron</i> and any canon of statutory construction	39
2. The Attorney General correctly concluded that the Free Press' losses were the product of normal market forces, not an effort to obtain a JOA	42
3. The Free Press did not have to be offered for sale in order to be eligible for a JOA	44
D. The Attorney General's Decision Establishes No Adverse Precedent	45
CONCLUSION	50
APPENDIX	51

TABLE OF AUTHORITIES

	<u>PAGE</u>
<i>Cases:</i>	
<i>Baltimore Gas & Electric Co. v. NRDC</i> , 462 U.S. 87 (1983)	28
<i>Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.</i> , 419 U.S. 281 (1974) ..	26,27,28
<i>Chevron U.S.A. Inc. v. NRDC</i> , 467 U.S. 837 (1984)	40
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	passim
<i>Citizens To Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	21,26
<i>City of Honolulu v. Hawaii Newspaper Agency</i> , 559 F. Supp. 1021 (D. Hawaii 1983)	8
<i>Committee For An Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983)	passim
<i>Dawson Chemical Co. v. Rohm & Hass Co.</i> , 448 U.S. 176 (1980)	41
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981)	28
<i>Graver Tank & Mfg. Co. v. Linde Air Products Co.</i> , 336 U.S. 271 (1949)	27
<i>International Shoe Co. v. FTC</i> , 280 U.S. 291 (1930)	7
<i>NCAA v. Board of Regents</i> , 468 U.S. 85 (1984)	27
<i>Pacific Sun Publishing Co. v. Chronicle Publishing Co.</i> , Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981)	8
<i>Pittston Coal Group v. Sebben</i> , 109 S. Ct. 414 (1988)	25

	<u>PAGE</u>
<i>Touche Ross & Co. v. Redington</i> , 442 U.S. 560 (1979)	41
<i>United States v. First City National Bank</i> , 386 U.S. 361 (1967)	26
<i>United States v. Ron Pair Enterprises, Inc.</i> , 109 S. Ct. 1026 (1989)	36
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	34-35
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978)	40
Statutes:	
5 U.S.C. 559	26
5 U.S.C. 706(2)(A)	9,21
12 U.S.C. 1828(c) (1964 ed., Supp. II)	34
Newspaper Preservation Act, 15 U.S.C. 1801-1804:	
15 U.S.C. 1801	<i>passim</i>
15 U.S.C. 1802(5)	<i>passim</i>
15 U.S.C. 1803(a)	8
15 U.S.C. 1803(b)	<i>passim</i>
Regulations:	
28 C.F.R. 48.8(c)	14
28 C.F.R. 48.10(d)	14
Legislative History:	
H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. (1970)	36
S. Rep. No. 91-535, 91st Cong., 1st Sess. (1969)	5,8,37
115 Cong. Rec. (1969):	
p. 6232	4
p. 15661	3
p. 15662	5

	<u>PAGE</u>
116 Cong. Rec. (1970):	
p. 1786	4,36-37
p. 1788	4,5,6,37
p. 1795	4
p. 1999	5
p. 2004-2005	26
p. 2017	8
p. 23146	4
p. 23152	6
p. 23153	4,5,6,25
p. 23154	4,42
p. 23165	4
p. 23166	5,37
p. 23168	36
p. 23171	5
p. 23173	36
p. 23179	8
<i>Hearings on S. 1312 Before the Subcomm. on Anti-trust and Monopoly of the Sen. Judiciary Comm.</i> , 90th Cong., 1st Sess. (1967)	25
<i>The Newspaper Preservation Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Sen. Judiciary Comm.</i> , 91st Cong., 1st Sess. (1969)	7-8

**BRIEF FOR RESPONDENT
DETROIT FREE PRESS, INCORPORATED**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 166a-190a) is reported at 868 F.2d 1285. The opinions accompanying the court's denial of rehearing *en banc* (Pet. App. 200a-211a) are reported at 868 F.2d 1300. The opinion of the district court (Pet. App. 149a-163a) is reported at 695 F. Supp. 1216.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and its order denying rehearing was entered on February 24, 1989 (Pet. App. 164a-165a, 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989, and was granted on May 1, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Introduction.

For more than a decade, the Detroit Free Press ("Free Press") and its competitor, The Detroit News ("News"), have been locked in a contest for economic survival in the local newspaper market. It is a contest that the Free Press has lost. Financially, the Free Press is a shell, and would have ceased publication years ago absent massive and continuing cash infusions from Knight-Ridder, Inc. ("Knight-Ridder"), its corporate parent. For years it has not earned enough money to cover its operating expenses. Its losses between 1979 and 1986, when the record in this case closed, totaled \$83 million. In the same period, Knight-Ridder, which sought to maintain the Free Press' presence in the community it has served for 158 years, has provided cash subsidies amounting to \$176 million.

Despite management changes, large investments in plant and equipment, and expensive campaigns to reduce the News' leadership in circulation and advertising, nothing has helped to stem the losses or improve the economic viability of the Free Press. And nothing more can now be done to turn around the newspaper's fortunes. It is undisputed that the Free Press, with prices already higher than those of the News, cannot simply raise its prices further. The resulting loss of readership and advertising would be catastrophic. It is similarly undisputed that the Free Press has available no unilateral business strategy that has any prospect of saving the newspaper. All that might save the Free Press is a decision by the News to abandon its long-standing strategy of maintaining and strengthening its dominant market position by charging low prices, thereby permitting the Free Press to raise its prices as well. Understandably, the News, on the verge of total competitive victory and determined to assure its own survival, has stated unequivocally that it will not change its low-price policy.

On this record, the Attorney General exercised his discretion under the Newspaper Preservation Act ("NPA") and approved a joint operating arrangement ("JOA") with the News that would ensure the survival of the Free Press. Petitioners, who did not participate in the administrative hearings in this case and who introduced no evidence, disagree with the Attorney General that the News will not raise prices, disagree that the Free Press will close if the joint operating arrangement is not approved, and disagree that the same economic forces that necessitated passage of the NPA operate in the Detroit market and confront the Detroit community with the loss of an independent editorial and reportorial voice. They ask this Court to make the implausible assumption that the Free Press and the News will simply abandon the pricing policies imposed on them by the forces of competition, and that both papers will raise their prices without the benefit of a JOA.

Petitioners' challenge lacks merit. The determination of the Attorney General, which rests on inferences regarding the probable course of future events in the Detroit newspaper market, is amply supported by record evidence. Those inferences and predictions, affirmed as reasonable by two lower courts, bring this case squarely within the language and intent of the Newspaper Preservation Act.

B. Competition In The Newspaper Industry.

The legislative history of the Newspaper Preservation Act, 15 U.S.C. 1801-1804, and the record compiled in this case, shed a clear light on competitive conditions in the newspaper industry. It is an industry marked by uniquely intensive competitive forces that imperil the survival of second or junior newspapers in almost every metropolitan market.

Between 1920 and 1968, the number of American cities supporting two daily newspapers declined from 552 to 45. 115 Cong. Rec. 15661 (1969) (Sen. Inouye). This precipitous reduction affected cities in all parts of the country, ranging from small towns to the largest metropolitan markets. By 1950, only 51 of the top 100 newspaper markets had more than one commercially-competitive newspaper, and that number rapidly declined in the years following. JA 537-540, 560-564; NX 702 A-F.¹ Since 1970, established junior newspapers in Washington, D.C. (the *Star*), Philadelphia (the *Bulletin*), Cleveland (the *Press*), Baltimore (the *News-American*), Buffalo (the *Courier-Express*), Newark (the *News*), Portland (the *Oregon Journal*), and Hartford (the *Times*) all have shut down. This trend has left only 15 cities in the top 100 markets with more

1. In this brief, "Tr. ____" refers to the transcript of the cross-examination and redirect before the administrative law judge; "NX ____" refers to exhibits introduced by the JOA applicants; "AX ____" refers to exhibits introduced by the Antitrust Division; and "IX ____" refers to exhibits introduced by the intervenors.

than one independent metropolitan daily newspaper. *Ibid.* Moreover, the health of the few junior papers that still survive is precarious. Of the nine remaining junior newspapers in the top 30 markets, seven show losses and only those in Chicago and Boston show even marginal profits. JA 539-540, 555-556; App., *infra*, at A-4 to A-5.

Congress was acutely concerned by this "startling trend away from multiple-newspaper cities" (116 Cong. Rec. 1788 (1970) (Sen. Fong)) and investigated the problem in depth in 1969 and 1970. In the course of that investigation, members of Congress hailed the maintenance of diverse editorial viewpoints as an overriding national priority. "These varying voices," declared Senator Inouye, "weave the basic fabric of our democratic system." 115 Cong. Rec. 6232 (1969). In the words of Senator Bennett, loss of multiple editorial voices would be "tragic," since the nation's "concept of freedom and our system of government" depends on "choice" between competing views. 116 Cong. Rec. 1786 (1970). See also *id.* at 1795 (Sen. Goldwater) (the "widest possible dissemination of information from diverse and antagonistic sources, is essential to the public welfare"); *id.* at 23146 (Rep. Kastenmeier) ("Newspapers play a special role in maintaining a democracy and diversity of opinion in this Republic"); *id.* at 23153 (Rep. Matsunaga) ("maintaining divergent newspaper editorial voices in our country's great cities" is plainly in the national interest); *id.* at 23154 (Rep. Railsback) (the trend toward editorial monopoly has "dangerous significance" and is "destructive of the freedom upon which the vitality of this Nation is based"); *id.* at 23165 (Rep. Udall) (further movement toward one-newspaper cities would be a "disaster for the country").

Congress found that the widespread failure of second newspapers results from the unique dynamics of newspaper competition. The economics of the newspaper industry "make it more likely for newspapers to fail when faced with

competition than other businesses." S. Rep. No. 91-535, 91st Cong., 1st Sess. 4 (1969) (hereinafter, "Senate Report"). One of the special economic forces that Congress found responsible for the decline in newspaper competition was the mutual interdependence of advertising and circulation. See 116 Cong. Rec. 23166 (1970); 115 Cong. Rec. 15662 (1969); 116 Cong. Rec. 1788, 23171 (1970). Strong circulation increases advertiser patronage; conversely, a large quantity of advertising increases circulation. A newspaper with greater advertising and circulation than its rival therefore has a significant advantage as it seeks to increase its competitive lead. JA 548-549.

By the same token, weaknesses in circulation and advertising feed off each other. Readers who buy newspapers for advertising information, and businesses that advertise to reach the most readers, soon abandon a weaker paper for a stronger one. JA 586-587, 215, 324-326. A junior paper in a two-paper market can thus find itself in a competitive straitjacket, with the owner required to subsidize mounting losses in an effort to maintain all-important circulation and advertising shares. JA 220-221. If the owner cannot afford to subsidize circulation and advertising, the junior paper's losses will precipitate a mutually-reinforcing decline of circulation and advertising from which there is no escape. JA 214-215. Faced with such a failure, a newspaper owner must choose among three "bleak alternatives": shut down; sell out to its competitor; or attempt to subsidize escalating losses for an indefinite period with the hope of somehow regaining the patronage of readers and advertisers. See 116 Cong. Rec. 23153 (1970) (Rep. Matsunaga); *id.* at 1999 (Sen. Fong).

The fear of slipping into a second-place position that ultimately will lead to failure spurs intensive price competition. JA 213-215, 220. A newspaper that raises its prices (or refuses to meet its competitor's price reductions) risks a decisive loss of market share. Avoidance of this risk may

require operation at a loss or marginal profit. In view of these economic realities, newspapers in many cities, including Detroit, have had no choice but to pursue a strategy of seeking competitive leadership or a first-place position—referred to as market “dominance.” As the CEO of Gannett Co., the current owner of the News, testified in this proceeding: “[T]he economic facts of life in the newspaper business have been for the past 40 years [that] the dominant newspaper, if it maintains its dominance long enough or enhances it, * * * ultimately thrives; the weaker paper ultimately dies.” JA 220. “[I]n every instance—every instance—the weaker newspaper has either died or been saved by a JOA or is presently in danger of dying. There are no exceptions in this country.” JA at 221.

Congress was aware that the unique dynamics of the newspaper industry compel papers to compete vigorously for circulation and advertising share in order to survive, sometimes at the cost of subsidizing unprofitable operations. Senator Fong, quoting the publisher of the *Honolulu Advertiser*, recognized that “massive and continuing infusions of capital” may be necessary to forestall a junior paper’s demise. 116 Cong. Rec. 1788 (1970). Representative Matsunaga similarly observed that publishers faced with intensive competition have been forced to “subsidize[] their newspapers” to avoid closure. *Id.* at 23152-23153 (1970). History teaches that a dominant paper that aggressively defends its lead can ordinarily outlast its rival. In Washington, D.C., for example, the *Star* failed despite large infusions from its parent, Time, Inc. Similar infusions of cash could not save the *Cleveland Press*, the *Philadelphia Bulletin*, or the *Buffalo Courier-Express*. JA 559; Tr. 2364. Likewise, last-minute sales to new owners rarely remedy the economic predicament of a second-position paper, as demonstrated in recent years in Philadelphia, Cleveland, and Washington, D.C. Tr. 2210, 2353.

C. Enactment Of The Newspaper Preservation Act.

The event that triggered remedial legislation by Congress in the newspaper industry was an antitrust action filed by the United States to declare unlawful a 20-year-old JOA. The JOA merged the business operations of two newspapers in Tucson, Arizona, while leaving their news and editorial operations separate and independent. The papers contended that the JOA was economically necessary to save the junior paper over the long term even though the junior paper did not yet face a “grave probability of a business failure,” as required under the traditional “failing company” doctrine of *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930).

This Court held, however, that the “failing company” doctrine applied with unmodified strictness to failing newspapers. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). Applying that standard to invalidate the JOA, the Court stated that “[t]here is no indication that the owners of the Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped.” *Id.* at 137. Because a dominant newspaper would gain no benefit from negotiating a JOA with a competitor on the brink of failure, the practical effect of *Citizen Publishing* was not only to put at risk the 21 JOAs then in existence in other cities, but also to remove the JOA as a viable alternative for the future.

Congress promptly responded to *Citizen Publishing* by passing the Newspaper Preservation Act in 1970. It did so over the opposition of the Antitrust Division of the Department of Justice. Richard McLaren, then head of the Division, took the position that “if a business concern, including a newspaper, can only be saved by eliminating all meaningful competition between it and its competitors, it would be better to let it disappear.” *The Newspaper Preservation*

Act: Hearings on S. 1520 Before the Subcomm. on Anti-trust and Monopoly of the Sen. Judiciary Comm., 91st Cong., 1st Sess. 295 (1969). Congress disagreed with that policy judgment and passed the Act by margins of 5 to 1 in the Senate and 3 to 1 in the House. 116 Cong. Rec. 2017, 23179 (1970). The purpose of the Newspaper Preservation Act was to overrule *Citizen Publishing* as to both existing and prospective JOAs, and thereby serve "the public interest [in] maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. See Senate Report at 4 ("The Committee wishes to establish a less stringent test than that applied in the case of *Citizen Publishing Company v. U.S.*").

For JOAs in existence in 1970, the Act established the requirement that, at the time the JOA was implemented, not more than one of the newspapers was "likely to remain or become a financially sound publication." 15 U.S.C. 1803(a). The Act left all pre-1970 JOAs in place, subject only to possible court challenge. The Act's standard for pre-1970 JOAs has been met by every JOA that has been tested. See *City of Honolulu v. Hawaii Newspaper Agency*, 559 F. Supp. 1021 (D. Hawaii 1983); *Pacific Sun Publishing Co. v. Chronicle Publishing Co.*, Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

Congress also established procedures and standards for future JOAs. In contrast to pre-1970 JOAs, however, the decision whether to approve post-1970 JOAs was committed to the discretion of the Attorney General. The Attorney General has sole responsibility under the statute to approve a JOA if he finds that two broadly-worded conditions are met: (1) that at least one of the two newspaper applicants is a "failing newspaper"—defined as a newspaper "which, regardless of its ownership or affiliations, is in probable danger of financial failure"—and (2) that approval of the JOA "would effectuate the policy and purpose" of the Act.

15 U.S.C. 1802(5), 1803(b). The statute has no provision for judicial review; suits challenging decisions by the Attorney General must proceed under the "arbitrary or capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

D. History Of The Detroit Newspaper War.

1. *The Competitive Battle: Dominance Equals Survival.* The "Great Detroit Newspaper War" between the Free Press and the News "traces back into dim history." Pet. App. 15a. Its modern phase began in 1960, when the News bought the assets of *The Detroit Times* and gained a substantial circulation lead over the Free Press. *Ibid.* The battle has been fought with increasing vigor ever since (*id.* at 15a-31a), motivated by the belief of each newspaper that it could not survive if it failed to secure for itself the dominant position in the market. A typical long-range planning document, prepared by the Free Press in 1981, declared that "[t]he Free Press, over the coming months and years, must position itself to be the dominant [and] surviving metropolitan newspaper." JA 604; see also *id.* at 605-608; NX 852 B.

The Free Press' perception of Detroit's inability to support two newspapers under competitive conditions hardened considerably from 1979 to 1984, when the Detroit economy suffered its most significant period of economic decline since the Great Depression. See Pet App. 14a. Significant declines in population, personal income, and retail sales hit the Free Press and the News severely. JA 277-278. In 1982, the President of the Free Press explained to Knight-Ridder: "I do not see how two newspapers in this market will ever show a profit." AX 508 C; see also NX 852 B, J; IX 42 A-C. The management of the News similarly concluded that the junior newspaper in Detroit would not survive. By 1982, neither Peter Clark, the President and Chairman of Evening News Association ("ENA"), which owned the

News, nor the ENA board of directors "envisioned any scenario where commercial competition could continue between the News and the Free Press long term." JA 510. That being the case, Mr. Clark concluded that in Detroit "dominance equals survival" and that there is "no safe niche for a second newspaper." JA 207-208, 504-505.

This view was shared by Allen Neuharth, the CEO of Gannett, which purchased the News in 1986. According to Mr. Neuharth, "[w]hen we began negotiations and for many years previously, I believe[d] that absent a JOA, Detroit would become a one newspaper town." JA 225, 480-481. Alvah H. Chapman, Jr., his counterpart at Knight-Ridder, was of the same view: "[T]here will only be one survivor in the newspaper business in Detroit. I've come to believe that for a number of years." JA 243. Thus, according to Free Press publisher David Lawrence, "it was a perilous and perhaps fatal position ultimately to be No. 2." JA 325.

After entering its fourth consecutive year of accelerating losses, Knight-Ridder in 1982 recognized the possibility that it might be driven to "shut down" the Free Press. AX 514 C; IX 42 B, C. It was aware that three other junior papers, the *Cleveland Press*, the *Philadelphia Bulletin*, and the *Buffalo Courier-Express*, had only recently been forced to close their doors. JA 559, 560-561, 405. Knight-Ridder reported that the Free Press constituted "the single most critical drain on the company's profits" and that "[t]he company cannot be expected to tolerate indefinitely, with no end in sight, the damage that this drain does to the company's overall strength." IX 99. Knight-Ridder ultimately decided, however, to continue its quest for market leadership because it believed (erroneously as events proved) that the News' losses were greater than those of the Free Press, and that the News might be forced ultimately to relax the defense of its dominant market position. JA 405-406.

Already the higher-priced paper, and unable to raise its prices and risk further loss of market share, the Free Press, with Knight-Ridder's backing, undertook in 1984 an ambitious (and expensive) program to break the stalemate. That program, called Operation Tiger, represented "a strategy for complete product dominance so that there is no category important to us or to our readers in which this newspaper is exceeded by its competitor." IX 99 C-D. Operation Tiger sought to improve the quality of the paper so much that prices could be raised without catastrophic readership loss. JA 329; IX 96 D; Tr. 2879-2880. It was an effort, in other words, to break the stranglehold of newspaper economics and achieve profitability through higher prices, irrespective of the News' determination to sell its paper at a low price to maintain high circulation. JA 348, 358-359, 512. To pursue Operation Tiger, the Knight-Ridder board authorized a capital expenditure of \$22.4 million to buy additional printing presses and expand the Free Press' Riverfront plant to accommodate them. JA 412.

Operation Tiger called for an increase in the price of the Sunday paper from \$.50 to \$.75, which the Free Press implemented in January 1985. IX 99 Z-33; JA 426. The News declined to match the price increase for three months, with devastating consequences for the Free Press: an 8% loss of Sunday circulation (70,000 issues) for the Free Press compared to a 2% gain by the News. JA 467, 202-203; NX 1 I, J. The Free Press' Sunday circulation has continued to fall in absolute amount and in market share relative to the News. JA 426-427, 622. Mr. Chapman testified that "I have not ever in my whole career experienced a price increase affecting circulation in such a negative fashion as has this one." JA 261, 328-329. By the same token, both Mr. Clark and his colleagues came to see that the News' belated decision to match the Free Press' Sunday increase was a serious mistake because it sacrificed an opportunity to

achieve further circulation gains. JA 519; Tr. 1396, 3403-3405.²

In short, Operation Tiger, a do-or-die effort by the Free Press to gain control of its own destiny, proved to be a costly failure. JA 218, 444. Total cash infusions of \$176 million from Knight-Ridder to the Free Press could not remedy the paper's untenable economic position. JA 265, 413-414.

2. *Knight-Ridder's Efforts To Obtain A JOA.* By 1981, the Free Press had entered its third year of increasing multi-million dollar losses. Pet. App. 76a-77a. As Detroit plunged deeper into recession, and with management already persuaded that two competitive papers could not survive in the city, the Free Press approached the dominant News to inquire about a possible JOA. The News' owners were polite, but firm: they had no interest. JA 406. ENA's chairman explained that "his company ha[d] traditionally been independent" and "[a]nything which interfered with traditional independence *** would be difficult to achieve." JA 600. Discussions concerning a possible JOA continued sporadically, but never seriously so far as the News was concerned. Pet. App. 20a-21a. Despite Knight-Ridder's hope that the News' owners might ultimately change their mind, the answer always remained the same, and the Great Detroit Newspaper War continued unabated. ENA sold the News to Gannett in 1985, never having agreed to a JOA.

At the time Gannett bought the News, the enormous expenditures associated with Operation Tiger had accomplished no more for the Free Press than maintenance of the status quo. Between 1982 and 1985, some circulation measures showed incremental gains by the Free Press (Pet. App. 46a-53a), but overall losses increased. App., *infra*, at A-1.

2. Despite the prospect of deep losses for each year since 1981, the News has resisted any advertising price increases. Tr. 1394-1395, 3373; JA 343-344; IX 274 B-C. The News' policy has been a key deterrent to any substantial advertising gains by the Free Press. Pet. App. 58a n.121.

Faced with the prospect of continuing financial losses for the News so long as Knight-Ridder was willing to subsidize the Free Press (Pet. App. 82a-85a), and uncertain about how long those subsidies would be continued (JA 259), Gannett expressed interest in discussing a JOA. Gannett's CEO explained that Gannett was in a "win, win" situation: either the News would maintain its intensely competitive pricing policies and outlast the Free Press, or it would enter into a JOA on favorable terms. JA 225-229; Pet. App. 116a.

The papers announced the JOA in April 1986. Under the JOA, commercial operations of the two newspapers will be combined but their respective news and editorial functions will remain separate and independent. The News is initially to receive 55% of the profits of the JOA, with profits to be split equally after five years. Crucial to Gannett was that it control the financial management of the two newspapers, and this right was obtained through the JOA. JA 522-523; Pet. App. 116a, 20a.

In the seven years preceding execution of the JOA, the Free Press had lost \$83 million, and its losses were accelerating. App., *infra*, at A-1. The newspaper had been kept alive only by cash infusions from Knight-Ridder totaling \$176 million. *Id.* at A-2. Despite these massive subsidies, and despite the narrowness of the News' persistent lead in total daily circulation (Pet. App. 41a), the News continued to enjoy clear superiority over the Free Press in areas of greatest economic importance. It had a clear lead in daily circulation, and almost 60% of Sunday circulation, in Detroit's Primary Market Area, which generates the largest amount of advertising and circulation revenues. Pet. App. 44a, 46a-49a; see also JA 454. The News also enjoyed a decisive 61% to 39% lead over the Free Press in advertising revenues, "by far the most important source of revenues for both newspapers." Pet. App. 58a, 61a; App., *infra*, at A-3. The News had total revenues of \$230 million in 1986, \$61 million (or 36%) more than the Free Press had available to

continue the competitive struggle. Pet. App. 76a-77a, 84a-85a; App., *infra*, at A-3.

Under these circumstances, the Free Press saw the JOA as the only way to remain in business and to save most of the 2,100 jobs that would be lost if the newspaper closed. See Free Press opposition to stay request in this Court, Ex. G, p. 4.

E. Proceedings Before The Attorney General.

In May 1986, the Free Press and the News applied to the Attorney General for approval of their JOA. Exercising his discretion under Justice Department regulations, the Attorney General referred the application to Morton Needelman, a retired FTC administrative law judge, for preliminary fact finding and a "recommendation" as to disposition. See 28 C.F.R. 48.8(c), 48.10(d). Both papers participated in the administrative hearings, as did the Antitrust Division. Six labor unions (representing more than 85% of Free Press employees) intervened in the proceeding; all of them ultimately supported approval of the JOA after concluding that without a JOA the Free Press would close. JA 126-129, 132-139. The Mayor of the City of Detroit also intervened, and, following the hearing, concluded that he did not oppose the JOA. JA 130-131.

After completion of the hearing, the ALJ summarized the facts and made extensive findings. The financial statements for the Free Press, included in the findings of the ALJ, showed total losses of over \$83 million from 1979 through 1986. Pet. App. 76a-77a. Thus, as the ALJ found, "there can be no serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis." Pet. App. 81a-82a. He also found that, among other advantages, the News had

almost 60% of the Sunday circulation in the Detroit Primary Market Area, 61.1% of total advertising revenues, and total revenues of \$230 million (\$61 million more than the Free Press). Pet. App. 61a, 76a-77a, 84a-85a. The ALJ acknowledged that the Free Press could not solve its financial problems through cost-cutting: "the Detroit unions have simply not been willing to accept less than the wages and benefits offered by metropolitan papers in other areas, and accordingly there is no basis for speculating about the possibility of cost savings in this area without a JOA." Pet. App. 100a-102a, 121a.

The ALJ recognized that there was nothing that the Free Press could do by itself to avoid or alleviate these losses. The managements of both papers, the ALJ found, "believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many [junior] papers which had not been able to survive as the second paper in metropolitan area competition." Pet. App. 19a. In agreement with an Antitrust Division expert witness who saw "no independent action * * * that could return the Free Press to profitability" (*id.* at 100a), the ALJ found that "[s]ince neither the Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability." *Id.* at 122a. Any "attempt by the Free Press to increase unilaterally the price of advertising would result in still further erosion of its share of lineage, which would give the News additional circulation." *Id.* at 93a. Nonetheless, on the basis of his speculation that in the absence of a JOA the News "may eventually" give up its long-standing fight for market dominance and raise its prices, thereby permitting the Free Press to follow suit and perhaps achieve profitability, the ALJ recommended denial of the application. Pet. App. 92a.

Following his review of the factual record compiled by the ALJ and the applicable law, the Attorney General approved the JOA. He agreed with a prior opinion of Attorney General William French Smith that "[i]t is apparent from the express language of the statute that 'failing newspaper' analysis under the Act must focus upon the financial condition of the particular publication at issue, and that 'danger of financial failure' must be assessed as a matter of probabilities, not certainties." JA 146 (citation omitted). He also agreed with and quoted the "commonsense" and admittedly narrow formulation of the standard articulated by the Ninth Circuit—"Is the newspaper suffering losses which more than likely cannot be reversed?" JA 146-147, citing *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983). Undisputed facts cited by the Attorney General (and found by the ALJ), including "operating losses * * * aggregating over \$81 million through 1986," made "failure" of the Free Press not merely probable but "highly 'probable.'" JA 146, 154.³

The Attorney General considered the possibility, given prominence by the ALJ, that despite management's detailed testimony to the contrary (JA 264-272, 283), the Free Press might continue to operate at a loss in the hope that the News would some day alter its competitive strategy and raise its prices. The Attorney General rejected that speculation as insufficiently likely to justify rejection of the JOA. The News "has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with" the Free Press—a strategy that "hardly reflects unsound business judgment" in light of the News' competitive ability to outlast the Free Press. JA 148-149. Furthermore, the

3. The Attorney General's reference to an \$81 million figure (JA 146) appears to be a minor typographical error. The chart cited in support of that figure (reproduced at Pet. App. 76a) correctly reflects a total loss for the Free Press of \$83 million.

Attorney General recognized that the same market forces that make it unduly risky for the Free Press to initiate a price increase apply as well to the News, and thus that an unsupported supposition of price increases by the News would be unwarranted. JA 145; see also *id.* at 586. Accordingly, "it is unquestionably the case that the Free Press is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself. Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the Free Press would have failed long ago." JA 147-148 (citations omitted).

The second statutory determination made by the Attorney General was that approval of the JOA "would effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). The congressional declaration of policy describes the legislation as serving "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States," and "the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement * * * is hereafter effected" pursuant to the statute. 15 U.S.C. 1801.

The Attorney General determined that Congress' purpose to preserve endangered editorial voices would be effectuated by approving the JOA in this instance (JA 151):

To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit. As the Administrative Law Judge found, this is not a situation where the Free Press has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement. Keen competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly—has moved both newspapers into intractable loss positions from

which only one, the News, now appears to have any reasonable prospect of emerging. (Citations omitted).

The Attorney General also found that approval of the JOA was appropriate despite the fact that Knight-Ridder's subsid had kept the Free Press from falling into a "downward spiral." He explained that "no less destructive of the dual objectives of preserving open competition and vigorous editorial debate [than a downward spiral] is the financial failure of one of two newspapers that has been locked for almost a decade in a severely competitive struggle for market domination and suffered irreversible operating losses year after year. If a JOA provides an acceptable means of avoiding the monopoly market anticipated in the former situation, so, too, does its approval serve to 'effectuate the policy and purpose' of the Act when confronted with the near certain newspaper monopoly that will result in the latter circumstance." JA 153.

Finally, the Attorney General considered but rejected as factually unsupported the assertion that "the prospect of a JOA" was "responsible most recently for the papers' reluctance to increase prices and eliminate discounting." He noted that the record "makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade, and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination." JA 152 (citation omitted).

F. Affirmance By The District Court.

Less than 48 hours before the JOA was to become effective, Public Citizen Litigation Group, representing an organization of about 20 individuals, filed a complaint in the district court challenging the Attorney General's decision. JA 156-166. None of the plaintiffs had participated in the

hearings before the ALJ. A 30-day stay was entered to permit full briefing of the case. *Id.* at 189-190.

After briefing and oral argument, the district court upheld the Attorney General's decision, finding that it was neither arbitrary nor capricious. Pet. App. 160a-161a. Judge Revercomb found ample evidence to support the conclusion that the Free Press constituted a "failing newspaper," given the paper's huge losses, its inability to pursue any unilateral business strategy that could return it to profitability, and the fact that the paper would have ceased publication long ago had it not been for the "massive infusions of funds" from its corporate parent. Pet. App. 156a.

The district court expressly rejected petitioners' assertion that the Attorney General was required to presume that the News would raise prices if a JOA were denied. The court explained that "the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon," considering that such a move would put at risk its circulation advantage, which in turn could jeopardize its position as the lead paper in Detroit, and considering that "the management of the News has stated that it has no intention of raising prices." Pet. App. 157a.

G. Affirmance By The Court Of Appeals.

The court of appeals affirmed. Judge Silberman, joined by Judge Robinson, explained that the Attorney General's construction of the Act, which followed the Ninth Circuit's decision in *Hearst*, was a reasonable statutory interpretation. Pet. App. 168a, 179a. The court also sustained as reasonable the Attorney General's application of the statute to the facts. *Id.* at 183a-189a.

Like the district court, the court of appeals found substantial evidence in the record for the Attorney General's predictions that in the absence of a JOA the News would not likely raise prices and that the Free Press would close. Pet.

App. 184a-186a. In addition, the court rejected as groundless petitioners' argument that the newspapers had pursued a price war in order to generate losses justifying a JOA, and thus were guilty of disqualifying management practices. "[T]he record of years of fierce competition and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA." *Id.* at 189a.

Judge Ruth Ginsburg dissented, recommending that the case be remanded for further explanation. Pet. App. 191a. In a footnote, Judge Ginsburg questioned dicta in the majority opinion regarding the proper treatment of canons of statutory construction. *Id.* at 196a n.6. She acknowledged, however, that the Attorney General in fact adopted a narrow construction of the NPA through his application of the *Hearst* decision, which held "that antitrust exemptions must be narrowly construed." *Id.* at 195a-196a.

The D.C. Circuit declined to rehear the case *en banc*. No other judges adopted the views expressed in Judge Ginsburg's dissenting opinion. Instead, Chief Judge Wald, joined by Judges Mikva and Edwards (in an opinion that Judge Ginsburg did not join) questioned the Attorney General's prediction that the News was unlikely to raise prices in the event a JOA were denied. Pet. App. 205a-209a. She speculated that unlawful predatory conduct may have precipitated the Free Press' failure (an assertion without support in any submission of the Antitrust Division or any finding by the Attorney General) and that the News was unlikely to continue its low prices because "standard economic principles" make continued low prices improbable. *Id.* at 209a.

The panel majority responded to Chief Judge Wald's arguments in a concurrence to the Court's denial of rehearing *en banc*. They observed that Congress had passed the

NPA precisely because "standard economic principles" frequently do not apply in the newspaper industry, and that pricing policies like those of the News and the Free Press that are designed to prevent the potentially devastating and permanent loss of market share are entirely rational. Pet. App. 200a-203a. Judges Silberman and Robinson also noted that allegations of predatory pricing were "not raised by any party—including the antitrust division—before the ALJ or the Attorney General." *Id.* at 203a.

SUMMARY OF ARGUMENT

The Newspaper Preservation Act embodies Congress' determination that, in the newspaper industry, strict application of the "failing company" defense does not promote competition, and should not be permitted because it compromises the First Amendment goal of maintaining diversity in reportorial and editorial voices. Based on an extensive evidentiary record showing that the Free Press is a commercial failure in the Detroit market and would cease publication absent approval of a joint operating agreement with the News, the Attorney General found that the Free Press is a "failing newspaper" and that approval of the JOA would "effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). This determination may not be set aside unless it is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Petitioners have not come close to satisfying that heavy burden.

The arbitrary or capricious standard narrowly circumscribes judicial review of administrative action. A reviewing court may overturn a decision only if it finds that the administrative decision-maker committed a procedural error, misconstrued the law or made a "clear error of judgment." *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). This case does not remotely resemble those situations. Petitioners do not argue that the

Attorney General's decision-making process was flawed, that the Attorney General neglected to consider a relevant statutory factor, or that the Attorney General failed to explain the reasons for his decision or its evidentiary basis. Rather, petitioners simply quarrel with the Attorney General's factual findings concerning the propriety of the competition between the Free Press and the News, and his predictions about the future of the Detroit newspaper market. But these determinations, which have been upheld by the district court and the court of appeals, find overwhelming support in the administrative record.

The record compiled at the administrative hearing contained abundant evidence of the Free Press' financial distress. As a consequence of its decades-long competitive battle with the News, the Free Press lost \$83 million from 1979 through 1986, and faced significant competitive disadvantages in circulation, advertising, and total revenues. Moreover, the evidence was undisputed that the Free Press could not take any unilateral action that would return the newspaper to profitability. Indeed, were it not for the massive infusion of \$176 million by its corporate parent, the Free Press would have failed years ago.

The record also establishes that the Free Press will close unless the JOA is approved. The News has no reason to alleviate the Free Press' financial difficulties by raising its own prices. Especially now that the Free Press' dismal financial condition has been revealed, the News can simply sit back and wait for the Free Press to fail. Knight-Ridder has made clear its intent to close the newspaper in the event the JOA is not approved, a perfectly rational action in light of its mounting, uncontrollable, and otherwise endless losses.

It is not difficult to apply the statutory standard to this factual situation. The Attorney General properly concluded that the Free Press is a "failing newspaper," which the NPA defines as a newspaper that is in "probable danger

of financial failure." 15 U.S.C. 1803(b), 1802(5). In view of the Free Press' continued deficits, its competitive disadvantages under almost every index of economic measurement, and the absence of any unilateral means for the newspaper to return to profitability, the Free Press surely meets this standard.

The Attorney General's conclusion that approval of the JOA would "effectuate the policy and purpose of" the Act is also plainly correct. 15 U.S.C. 1803(b). The statutory policy of maintaining diverse editorial and reportorial voices will be furthered by approval of the JOA because that is the only course of action that will allow both newspapers to survive. The sole alternative is elimination of the Free Press and establishment of a complete economic and editorial newspaper monopoly in Detroit.

This is a clear case for application of the Newspaper Preservation Act. The junior newspaper in this two-newspaper market unquestionably is in severe financial distress, with no way to halt its accelerating losses other than ceasing operations. Congress determined that a JOA should be available in just such a situation in order to further the First Amendment goal of preserving multiple editorial voices for the communication of diverse viewpoints. The Attorney General's approval of the JOA should not be overturned by this Court.

ARGUMENT

THE ATTORNEY GENERAL'S APPROVAL OF THE JOINT OPERATING ARRANGEMENT SHOULD BE AFFIRMED BECAUSE IT CONSTITUTES A REASONABLE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE.

Congress in the Newspaper Preservation Act expressly delegated to the Attorney General the authority to evaluate and rule upon applications for JOAs. The statute empowers the Attorney General to approve a joint operating

arrangement if he determines that a newspaper is a "failing newspaper" and that approval of the JOA "would effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). The term "failing newspaper" is defined as a newspaper "which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). Congress left no doubt that its purpose was to serve "the public interest [in] maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Congress also declared it to be the nation's "public policy * * * to preserve the publication of newspapers in any city, community, or metropolitan area" where a joint operating arrangement is approved under the standards of the Act. 15 U.S.C. 1801.

In approving the Detroit JOA in a comprehensive and carefully-reasoned opinion, the Attorney General made both of the determinations required by Congress: that the Free Press is a "failing newspaper" and that "the policy and purpose" of the NPA would be well served by preventing the newspaper's demise. His decision rested on findings of historical fact made by the administrative law judge, as well as predictions and inferences that reasonably flowed from those facts. Both lower courts concluded that the Attorney General's decision was well within the range of discretion conferred on him by Congress. Petitioners have offered no reason for this Court to overturn that collective judgment.

A. The Attorney General's Determinations Under The Act May Not Be Set Aside Unless They Are Shown To Be Arbitrary Or Capricious.

Judicial review of the Attorney General's decision under the NPA is governed by the familiar principles set forth in the Administrative Procedure Act. The administrative mechanism established by the NPA is indistinguishable from the numerous other situations in which Congress has

conferred upon an administrative decision-maker the discretion to implement on a case-by-case basis a policy decision embodied in the governing statute. Thus, the NPA not only empowers the Attorney General to make the determinations at issue here, but also speaks in generic and inclusive terms that call for the exercise of administrative judgment. The Act encompasses any newspaper that, viewed without reference to the assets of or assistance from its owner, is in "probable danger" of financial failure. The Act looks to probabilities, not certainties. The Act also calls on the Attorney General to safeguard the public interest in maintaining the independence and competitiveness of the "editorial[]" and "reportorial[]" voices of newspapers in "any city," "community" or "metropolitan area" (15 U.S.C. 1801), from small towns to "our country's great cities." 116 Cong. Rec. 23153 (Rep. Matsunaga).

On its face, this is not an enactment that stringently limits the circumstances in which the Attorney General may act to save a failing newspaper, as petitioners erroneously suggest. Br. 17-21. See *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 420-421 (1988). Congress did not require the existence of particular enumerated adverse market conditions or insist that papers be on the verge of collapse, but focused instead on the probability of failure and the public policy of preserving diversity of editorial and reportorial points of view in any city threatened with newspaper closure.

Moreover, Congress' decision to entrust these determinations to the Attorney General was a considered one. As originally introduced, the bill that became the Newspaper Preservation Act would have authorized the federal courts to determine the lawfulness of prospective JOAs. - *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Sen. Judiciary Comm.*, 90th Cong., 1st Sess. 451 (1967). The bill was amended in committee to transfer all decision-making authority over post-1970 JOAs to the Attorney General, and the Senate defeated an effort to

return that authority to the courts. 116 Cong. Rec. 2004-2005 (1970).

An administrative decision rendered by the official designated by Congress is, of course, entitled to "a presumption of regularity." *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). It may be overturned on judicial review only if it is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). That standard of review "is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416. Absent proof that the administrative decision-maker either failed to consider the relevant factors or committed a "clear error of judgment," the administrative determination must be upheld. *Ibid.*; see also *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286, 290 (1974).⁴

As we demonstrate below, the Attorney General's application of the generic language of the Newspaper Preservation Act to the facts of this particular record not only falls within the broad range of discretion that applies to such administrative action, but indeed is plainly correct on the merits. Under no sensible construction of the NPA could the Free Press be characterized as anything other than a

4. Petitioners conceded in the court of appeals that the Attorney General's determinations were subject to deferential review under the APA. See Pet. C.A. Br. 17-18. In this Court, however, petitioners make the remarkable argument that no deference is warranted. Br. 34-39. But nothing in the language or legislative history of the Newspaper Preservation Act suggests that Congress intended to override the otherwise applicable standard of review under the APA (see 5 U.S.C. 559). The evidence that petitioners offer—that "Congress expected the courts to construe the Act" (Pet. Br. 35)—does not speak to the standard of review. Furthermore, the case upon which petitioners rely, *United States v. First City National Bank*, 386 U.S. 361 (1967), is plainly irrelevant here because the statute before the Court in that case *did* contain a provision expressly providing for "review *de novo*" of the administrative decision. See *id.* at 365, 368; see also pp. 40-41, *infra*.

newspaper in "probable danger of financial failure." And it would clearly do violence to Congress' stated policy of preserving editorial and reportorial diversity to silence the voice of this newspaper merely because it has been forced to the wall by the rigors of a competitive struggle "waged energetically but both responsibly and properly." JA 151.

B. The Attorney General's Decision Is Consistent With The Language, Legislative History And Purpose Of The Newspaper Preservation Act.

1. The Attorney General's findings and predictions are amply supported by the record.

Although petitioners contend that the Attorney General's decision to approve the JOA is contrary to the Newspaper Preservation Act, their arguments depend almost entirely upon challenges to the Attorney General's factual findings and predictions about the Detroit newspaper market. Petitioners assert, for example, that the Free Press "was in a position to become the dominant newspaper in Detroit" (Br. 22), that "the Free Press was a healthy paper and had a number of competitive advantages over the News" (Br. 23), that "the newspapers were essentially competitive equals" (Br. 23), and that "the News [would not] maintain its low prices" if the JOA were denied (Br. 27 n.9).

The Attorney General, of course, made precisely the opposite determinations, as he was entirely free to do under the NPA. See *Bowman Transportation*, 419 U.S. at 288 n. 4, 292-293. Those findings were upheld by both the district court and the court of appeals. This Court frequently has stated that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). See also *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984). Petitioners have not come close to meeting that heavy burden here.

Indeed, this is a particularly inappropriate case for disturbing those fact findings, because the Attorney General's determinations rested principally on his assessment of future events. The NPA requires the Attorney General to make a specialized predictive judgment about what events are likely to occur in a particular newspaper market. Here, for example, the Attorney General had to determine whether the News was likely to maintain the low prices that led to its position of market leadership, and whether the Free Press would probably fail absent a JOA. In an area of predictive judgment such as this, a reviewing court has a particularly tenuous basis for second-guessing the evaluation of the responsible executive official. See *Bowman Transportation*, 419 U.S. at 292-293; *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983) (a reviewing court must be "most deferential" when evaluating administrative "predictions," as opposed to "simple findings of fact"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (same).

The Attorney General, the district court, and the court of appeals all agree that the Free Press will probably fail unless a JOA is granted. This unanimity forecloses petitioners' transparent attempt to relitigate the facts in this Court. Beyond this, even if petitioners' claims could be considered afresh, they would have to be rejected, because the administrative record contains overwhelming support for the Attorney General's determination.

As the Attorney General explained, the evidence showed that the Free Press lost \$83 million from 1979 through 1986, that the News enjoyed significant, long-standing competitive advantages in both advertising and circulation, that the Free Press' losses were not the result of any improper marketing practices or mismanagement, that the Free Press had "no realistic prospect of outlasting the News, given the latter's substantial advertising and persistent circulation lead," that the Free Press would have failed years earlier

were it not for \$176 million in cash subsidies from Knight-Ridder, and that, "as all seem to acknowledge," there is nothing that the Free Press can do unilaterally to restore the paper to a profitable position. JA 146-148. Based on these findings, the Attorney General determined that "the Free Press has satisfactorily demonstrated that the danger of its financial failure has moved well within the zone of 'probability'"—and, in fact, is "highly 'probable.'" JA 151, 154.

By the same token, the Attorney General plainly was entitled to determine that, if a JOA were denied, the News was not likely unilaterally to raise its prices, thereby permitting the Free Press to follow suit and perhaps become profitable. As the Attorney General noted (JA 148-149), Mr. Neuharth, Gannett's CEO, testified that maintaining existing prices and awaiting the demise of the Free Press was something that Gannett was "prepared to do," despite the "heavy price tag" of its own continuing losses in the interim. JA 228-229. Mr. Neuharth expressed confidence that the News' policy of not raising prices ultimately would result in "The Detroit News [being] the only surviving newspaper," be it in "one year, three, five [or] ten." *Ibid.*

No rule of law required the Attorney General to disbelieve this account of the News' strategy, which comported with the views of expert witnesses (see, e.g., JA 306, 320-321) and with sound business judgment. After all, the News had achieved market dominance by maintaining its circulation and advertising advantages. It would have been perverse for the News to give up the fight with victory at hand, and thereby risk losing its commanding lead over the Free Press. As Gannett's CEO candidly acknowledged, the News viewed itself as in a "win, win" situation, with failure of the Free Press as the alternative to a JOA. JA 225-226, 228-229. Thus, as the Attorney General concluded, "it hardly reflects unsound business judgment to retain a while longer the News' current depressed pricing practices with so

many indications that the Free Press and Knight-Ridder have abandoned all hope of market domination." JA 149. See Pet. App. 157a.

Similarly, the Attorney General's prediction that the Free Press would close its doors if a JOA were denied was well grounded in fact. Alvah H. Chapman, Jr., Chairman and CEO of Knight-Ridder, testified during cross-examination as follows (JA 283):

Q. By your testimony just before the break you did not mean to suggest, did you, that the only alternative to a JOA is closure of the Free Press and selling off assets, did you?

A. I meant to emphasize exactly that, sir.

Far from being a "bolt out of the blue" (Pet. Br. 9-10), this representation was fully substantiated by Mr. Chapman, who offered a lengthy, detailed, and reasoned explanation why the Free Press would have to shut down absent a JOA (see JA 264-271), and was bolstered by documentary evidence establishing that Knight-Ridder considered closing the Free Press as early as 1982 and 1985. AX 514 C; IX 42 B, C; JA 413; Tr. 1793. More important, it also was supported by common sense: a business locked into escalating losses, with no ability to eliminate those losses, and with no reasonable hope of returning to profitability, cannot be expected to remain in operation indefinitely. As the Attorney General remarked, "[i]t would be neither counterintuitive nor contradictory for Knight-Ridder to [close the newspaper] upon concluding, after all these years, that the Free Press no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses." JA 149.

Finally, the Attorney General reasonably determined that approval of the JOA would comport with the policy and purpose of the NPA. The events that led to the financial

distress of the Free Press were the result of "[k]een competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly." JA 151. The Attorney General agreed with the ALJ that "this is not a situation where the Free Press has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement." *Ibid.* And in light of the evidence that the Free Press was likely to close if the JOA were denied, the Attorney General correctly concluded that "approval of the JOA will plainly further the legislative purpose of preserving multiple editorial voices in Detroit—an outcome that does not appear to be in the future otherwise." JA 152.

In sum, the Attorney General "accepted as accurate the fact findings" of the ALJ, but differed "with his ultimate conclusion as to where those facts lead." JA 153. In the Attorney General's view (JA 153-154),

the continuing and persistent operating losses suffered by the Free Press over the course of nearly a decade, with no prospect of unilaterally reversing that economic condition in the foreseeable future, describes a newspaper "in danger of financial failure." Because its competitor leads in virtually all economic indices, is prepared (indeed committed) to continue its depressed pricing practices at levels below the Free Press in order to insure that the *News* maintains its circulation and advertising advantages, and undoubtedly has the ability on such terms to outlast the Free Press, the very real potential for failure becomes highly "probable".

This conclusion, as both lower courts found, is fully supported by the evidence. See pp. 16-21, *supra*.

Petitioners attempt to undermine the Attorney General's predictions by mischaracterizing the record and by relying on conclusions and speculations of the ALJ that the Attorney General was not bound to accept. For example,

although petitioners assert, without citation, that “the ALJ concluded that the Free Press was a healthy paper” (Br. 23), the ALJ in fact confirmed that the News led the Free Press “in most circulation, revenue, and lineage measures of the rivalry between two competing metropolitan newspapers.” Pet. App. 120a. The ALJ also found that

there can be no serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis.

Id. at 81a-82a (citations omitted). This hardly characterizes a “healthy” or “competitive” newspaper.

Petitioners also seek to impeach the Attorney General’s findings by referring (Br. 22) to the Free Press’ decision to expand its printing plant in 1985. But, as Knight-Ridder’s CEO explained, the Knight-Ridder board of directors “was influenced in its decision by my assurance that the additional printing presses and related equipment that the Free Press was to receive could be used elsewhere in the Knight-Ridder system if the Free Press ultimately failed.” JA 413. Similarly, contrary to petitioners’ suggestion (Br. 23), the eventual 50/50 profit split between the Free Press and the News hardly represented the newspapers’ belief that the Free Press was financially sound. Rather, the division of profits under the JOA reflected the parties’ realization that Knight-Ridder had the resources and perceived determination to keep the Free Press alive, and thus to extend the News’ own losses, indefinitely. See JA 421, 443-444; Tr. 1918-1919; JA 228-229.

2. The Attorney General’s determinations plainly satisfy the standards of the NPA.

We have shown above that the Attorney General’s factual findings and predictions, which were upheld by the district court and the court of appeals, are fully supported by the administrative record. Once petitioners’ spurious challenges to those factual determinations are cleared away, there can be no serious question that the requirements of the Newspaper Preservation Act were met in this case and that the Attorney General’s decision to approve the JOA was not arbitrary or capricious. Petitioners try to muddy the waters by arguing that the courts below affirmed the Attorney General’s ruling only by deferring—improperly in their view—to his interpretation of the statute. See Pet. Br. 14, 29-39. But petitioners’ long-winded diatribe about “deference” is a red herring: even if *no* deference at all is accorded to the Attorney General’s view of the NPA, the undisputed facts relied on by the Attorney General unquestionably satisfy the statutory standard.⁵

a. *Failing Newspaper.* The NPA empowers the Attorney General to approve a JOA whenever he determines that one of the newspapers involved in the arrangement is a “failing newspaper.” 15 U.S.C. 1803(b). The statute defines “failing newspaper” to mean “a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.” 15 U.S.C. 1802(5). Thus, to be eligible for a JOA, a newspaper need not have suffered a financial failure; it need not even be in grave danger of financial failure. See pp. 7-8, *supra*. Rather, Congress determined that an applicant need only demonstrate that it is in “*probable danger of financial failure*.” That phrase may be difficult to apply in some circumstances, but it is remarkably easy to apply here: in view of the evidence recounted above—showing multi-million dollar

5. As explained on pp. 40-41, *infra*, the Attorney General’s decision plainly is entitled to substantial deference.

losses for nearly a decade, accelerating deficits in nearly every year despite a massive infusion of cash from Knight-Ridder, substantial competitive disadvantages in almost every economic category, continuing fierce competition from the News, and no unilateral solution that could restore profitability—it is inconceivable that the Free Press could be found not to meet the statutory standard.

For their part, petitioners make no effort to propound a test for determining when a newspaper is in “probable danger of financial failure.” Instead, they submit that “in this case, the Court need not formulate an all-inclusive test” (Br. 21), but can overturn approval of the JOA simply because there was no proof of a “downward spiral” (Br. 20-21), because “the prospect of a JOA was an essential factor in the Free Press’ losses” (Br. 21), and because approval of the application “would jeopardize healthy newspapers in other cities.” Br. 21. The factual premise for these assertions is completely erroneous. See pp. 42-44, 45-48, *infra*. But more important, the statutory definition of a “failing newspaper” speaks not a word about “downward spirals,” “the potential of the market to support two papers,” “normal market forces,” “other cities,” “essential factors” or any of the other nebulous criteria or litmus tests that petitioners would engraft onto the Act. Br. 13, 20-22. Rather, Congress clearly provided that a newspaper is a “failing newspaper” if it is in “probable danger of financial failure”—in other words, if it is likely to go out of business because of irreversible monetary losses. That is exactly what the evidence showed and the Attorney General found. Petitioners’ position simply ignores the language of the statute, which focuses solely on the present and future economic status of the newspaper seeking approval of a JOA.⁶

6. Petitioners argue at some length (Br. 13, 19-20) that the Attorney General was required to apply the “probable danger of financial failure” test in light of the standard used in granting antitrust exemptions under the Bank Merger Act, 12 U.S.C. 1828(c) (1964 ed., Supp. II), as interpreted in *United States v. Third National Bank*, 390 U.S.

What is more, by repeatedly trumpeting the Free Press’ strenuous efforts to remain competitive with the News (see Br. 22-24)—without ever acknowledging that these efforts were totally dependent upon enormous subsidies from Knight-Ridder—petitioners also ignore Congress’ express direction that the NPA be applied without regard to a newspaper’s “ownership or affiliations” (15 U.S.C. 1802(5)). Here, of course, were it not for the \$176 million life-support system provided by Knight-Ridder over the past decade, the Free Press would not merely have been “failing”—*it would have failed many years earlier*. The Attorney General correctly understood this critical fact. See JA 147-148 (“were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the Free Press would have failed long ago”).

Petitioners’ amorphous presentation not only fails to offer a reasoned and coherent interpretation of the NPA, but also fails to explain what course of action the Free Press could prudently follow, other than to enter into a JOA or go out of business. As the district court noted, petitioners’ “prediction[] about a bright future * * * comes with no timetable and no guarantee of probability, and does nothing to change the Free Press’ *current* status as in ‘probable danger of financial failure.’” Pet. App. 157a (emphasis in original). Petitioners presumably propose to have the Free Press bleed for several more years (or collude with the News to raise

171, 188-189 (1968). But petitioners offer no reason to believe that the Attorney General did not do so. Petitioners acknowledge (Br. 19-20) that the Justice Department has referred to *Third National Bank* in ruling on JOAs, that the ALJ did so in this case, and that the Ninth Circuit relied on that standard in its decision in *Hearst*, 704 F.2d at 476-477, which the Attorney General expressly followed here. JA 146-147. More important, petitioners do not explain why the JOA should have been disapproved under *Third National Bank*. The Attorney General agreed with the ALJ’s findings that the Free Press losses were *not* caused by mismanagement (JA 151; Pet. App. 102a-104a, 120a-121a, 128a) and that there was *no* strategy that the Free Press could unilaterally adopt to save itself (JA 146; Pet. App. 122a).

prices). But "[t]he NPA does not require that a newspaper publisher suffer massive losses by keeping the publication in business during unprofitable years." *Ibid.* Thus, petitioners' arguments are directly contrary to the plain language of the Newspaper Preservation Act.

Where, as here, Congress has stated its intent in terms that clearly encompass the case at hand, there is "no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989). Nonetheless, nothing in the legislative history of the NPA conflicts with its language or supports petitioners' suggestion that Congress did not intend the Act to apply in a case such as this. To the contrary, it is evident from Congress' express repudiation of the *Citizen Publishing* decision that it intended the "failing newspaper" standard to be significantly broader than the "failing company" defense under the antitrust laws, which required proof that the company was on the brink of collapse. See *Citizen Publishing*, 394 U.S. at 137 (JOAs violated pre-NPA law unless one newspaper faced a "grave probability of a business failure" and was "on the verge of going out of business").

The legislative history shows that Congress was acutely aware that normal competitive conditions peculiar to the newspaper industry can precipitate financial failures in two-newspaper cities, with the consequent loss of independent editorial voices. See H. R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3-4 (1970); see also pp. 3-6, *supra*. And Congress also was aware that the "failing company" defense recognized under the antitrust laws was "inadequate for newspapers" (116 Cong. Rec. 23168 (1970) (Rep. Annunzio)) and "has been of little value to the newspapers" (*id.* at 23173 (Rep. Boggs)), because it was not available early enough to prevent the dominant paper from merely sitting back and awaiting the demise of its rival. See, e.g., *Hearst*, 704 F.2d at 479 n.10; 116 Cong. Rec. 1786 (1970) (Sen.

Bennett); *id.* at 1788 (Sen. Fong). Accordingly, Congress sought "to establish a less stringent test than that applied in *Citizen Publishing*" (*ibid.* (quoting Senate Report at 4)) in recognition of the fact that "[t]he strict standard * * * is not applicable to newspapers as a dying daily cannot recover its lost circulation and advertising revenues by its sole efforts." *Id.* at 23166 (Rep. Adair).

Petitioners' construction of the NPA would frustrate these goals in several respects. First, petitioners' insistence that the NPA must be given a grudging or restrictive interpretation would be wholly inconsistent with Congress' decision to overturn *Citizen Publishing*—which had itself adopted a narrow interpretation of an exemption from the antitrust laws. Thus, acceptance of petitioners' submission would nullify Congress' efforts to preserve important First Amendment values by giving editorial and reportorial diversity precedence over stringent anti-merger doctrines announced by the courts.

In addition, petitioners' position, which suggests that a failing newspaper must produce "convincing evidence of an irreversible economic condition that would produce domination and a downward spiral" (Pet. Br. 20), would reinstate the inevitable failure standard of *Citizen Publishing* and would delay relief under the NPA until it was too late to do any good. By the time a failing newspaper could surmount the evidentiary barriers petitioners propose, the newspaper's financial condition would have so far deteriorated that the dominant paper would have every incentive to wait for its rival to fail, and thereby gain a complete monopoly, rather than negotiate a JOA. By engrafting such unwritten restrictions onto the NPA, petitioners clearly reveal their hostility to the statute Congress actually enacted.

b. *Policy and purpose of the NPA.* The NPA also requires the Attorney General to determine that approval of a JOA would "effectuate the policy and purpose of" the Act. 15 U.S.C. 1803(b). Congress identified that policy

and purpose as the maintenance of "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. Here, too, the Attorney General's decision was fully consistent with the statutory mandate.

The Attorney General expressly recognized that the NPA was intended to achieve "two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving 'editorially and reportorially independent and competitive' newspapers." JA 150. The Attorney General determined that approval of the JOA would serve the goal of preserving editorial diversity because the Free Press was likely to go out of business in the absence of a JOA, thereby leaving the News without competition in one of the nation's largest markets. JA 151. As the Attorney General explained: "To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit." *Ibid.* By the same token, the Attorney General was equally sensitive to the "more general" objectives of the antitrust laws. Thus, the Attorney General emphasized that the Free Press' financial problems were the result of "[k]een competition" (JA 151), rather than "improper marketing practices or culpable mismanagement" (*ibid.*), and were not the product of an effort to produce a JOA. See JA 152.

Once again, it is impossible to conclude that the Attorney General's judgment in these matters was arbitrary or capricious. The Attorney General applied the standard set forth in the statute and explained his decision fully. Where, as in the case of the Free Press, a newspaper has been driven to the brink of financial failure through lawful competitive conduct, consistent not only with the antitrust laws but also with the "market reality" in the newspaper industry (JA 149), and where approval of a JOA "will plainly further the legislative purpose of preserving multiple editorial voices in

Detroit—an outcome that does not appear to be in the future otherwise" (JA 152), the policy and purpose of the NPA would demonstrably be ill-served by denial of a JOA.

As the district court and the court of appeals recognized, decisions such as this, requiring predictive judgments and reconciliation of policy objectives entrusted to an agency for implementation, are entitled to substantial deference. Speculating that the News "may eventually initiate circulation price increases," the ALJ proposed what the court of appeals aptly called a "high stakes regulatory game" with the future of the Free Press, gambling that the News (contrary to its representations) would abandon its decade-long competitive strategy and raise its prices, thereby permitting both papers (for the time being) to perhaps become profitable. Pet. App. 92a, 187a. The Attorney General—"concerned that if he gambled on the ALJ's prediction that both newspapers were bluffing, Detroit would lose a newspaper" (Pet. App. 187a)—drew different inferences as to the likely outcome from the facts, inferences left undisturbed by two lower courts. That decision was, quite simply, his to make under the NPA.

C. Petitioners' Have Failed To Identify Any Defect In The Attorney General's Legal Analysis.

Petitioners attempt to divert attention from the Attorney General's unassailable factual findings, which have been upheld by both courts below, and the language of the NPA, which plainly encompasses this case, by including in their brief a grab-bag of unrelated arguments designed to cast doubt on the Attorney General's determination. These contentions are devoid of merit.

1. This case presents no conflict between *Chevron* and any canon of statutory construction.

Petitioners devote nearly half of the argument portion of their brief (Br. 29-39) to the contention that the Attorney

General failed to abide by the canon of statutory construction that exemptions from the antitrust laws should be narrowly construed, and that the court of appeals failed to correct the Attorney General's error because it mistakenly believed itself bound to adopt the Attorney General's approach under the rule of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). We have already shown that this "deference" argument is irrelevant because the statute plainly covers this case. Petitioners' argument in any event is insubstantial.

First, petitioners are simply wrong in suggesting that the Attorney General ignored the canon of construction. The Attorney General expressly adopted the interpretation of the statute set forth in *Hearst* (see JA 146-147), which was fashioned by the Ninth Circuit pursuant to the principle that antitrust exemptions "must be narrowly construed." 704 F.2d at 478. The Attorney General's construction of the statute thus takes account of the very principle that is the cornerstone of petitioners' argument. See also Pet. Br. 29-30 (conceding that the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so").

Second, the court of appeals correctly concluded that the Attorney General's interpretation of the NPA is entitled to deference. As petitioners themselves recognize (Br. 34), the principle that deference should be accorded to decisions by the administrative officer selected by Congress to implement a statute has long been a part of our jurisprudence. See *Chevron*, 467 U.S. at 843-845 & n.14 (collecting cases); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978). There is no reason why a contrary rule should apply under the NPA.⁷ Since the Attorney General took all

7. The fact that "Congress expected the courts to construe the Act" (Pet. Br. 35) provides no support for the extraordinary rule advocated by petitioners: that courts owe the Attorney General no deference in determining what the NPA means. Cases suggesting that little deference is due to administrative interpretations of the antitrust laws (Pet.

relevant factors into account in applying the statute, contradicted none of its provisions, and fully explained his rationale, his determination clearly is entitled to judicial deference.

More fundamentally, petitioners' argument uses canons of construction in a purely mechanical fashion, to override literal statutory language, legislative history, and administrative discretion in a single stroke. In petitioners' hands, canons of construction implement free-floating policy preferences unrelated to the legislation Congress actually enacted. But in fact, canons of construction are merely common-sense guides for ascertaining congressional intent. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("[t]he ultimate question" in construing a federal statute "is one of congressional intent"). In other similar contexts, this Court has refused to construe antitrust exemptions "narrowly" where the proffered narrow construction would defeat significant competing interests recognized by Congress. See, e.g., *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-221, 223 (1980) (the patent exemption from the antitrust laws should not be construed narrowly because the policy of the patent system to stimulate invention "runs no less deep" than the antitrust policy of free competition). As we have discussed in detail above, the decision of the Attorney General, protecting important

Br. 34-35, 38) are beside the point here. At issue in this case is the scope of a statute that carves out an *exemption* from the antitrust laws and that is implemented by an administrative officer.

Moreover, it is the decision of the Attorney General rather than the Antitrust Division that is entitled to deference. Because the NPA effectuates antitrust policies and other societal values of overriding importance (see p. 4, *supra*), the Attorney General, not the Antitrust Division (which vehemently opposed passage of the Act) is entrusted with its implementation. See pp. 7-8, *supra*. Indeed, this was the third of five JOA applications that was approved by an Attorney General over the opposition of the Antitrust Division.

First Amendment values, accords completely with Congress' intent in enacting the NPA.

Petitioners also do not explain what a "narrow" construction of the NPA would require JOA applicants to demonstrate. Indeed, their approach to the NPA is one of indiscriminate hostility toward JOAs, a view of the statute that surely contravenes congressional intent. The *Hearst* court pointed out that, while exemptions from the antitrust laws should be construed narrowly, courts are not free to "emasculate the [NPA] in the guise of narrowly construing it." 704 F.2d at 483. That is precisely what petitioners seek to do. In petitioners' view, the NPA was intended to preserve *commercial* competition between newspapers. Selectively quoting from the statute itself, petitioners assert that the NPA "emphasizes 'the public interest of maintaining a newspaper press [that is] competitive in all parts of the United States.'" Pet. Br. 18 (quoting 15 U.S.C. 1801 (brackets added by petitioners)). In fact, the provision of the NPA cited by petitioners expresses the quite different purpose of seeking to preserve "a newspaper press *editorially and reportorially independent and competitive*" (language omitted by petitioners emphasized). Congress' overriding objective was to effectuate the First Amendment goal of preserving "competition in ideas." 116 Cong. Rec. 23154 (1970) (Rep. Railsback). Petitioners' crabbed construction of the statute would frustrate achievement of that vital objective.

2. The Attorney General correctly concluded that the Free Press' losses were the product of normal market forces, not an effort to obtain a JOA.

Petitioners argue (Br. 7-8, 21) that the JOA application should have been denied because the prospect of a JOA was an "essential factor" in the business decisions that led to the Free Press' accelerating losses. In fact, the Attorney General found that the prospect of a JOA was *not* an essential

factor in the Free Press' losses. The Attorney General (affirmed by the courts below) instead found that "the heavy expenditure of investment capital by Knight-Ridder over [the past decade] belies the notion that it was principally pursuing any end other than market domination." JA 152. And the record makes clear that, far from being an outgrowth of JOA discussions, the Free Press' aggressive competition began long before the first such discussions took place. Pet. App. 16a-18a; JA 51-52.

Furthermore, there is nothing sinister about the fact that officials from the two papers engaged in on-and-off discussions about a possible JOA for years before the agreement actually was consummated. That pattern is a typical one. See JA 196-197 (nine years of discussions preceded the Seattle agreement); *id.* at 191-194 (almost four years of negotiations preceded the Cincinnati agreement). Congress plainly did not intend the newspaper industry to feign ignorance of the NPA.⁸

Petitioners nonetheless contend (Br. 14) that the prospect of a JOA prompted "reckless competition" between the Free Press and the News and that the Free Press' losses did not result from "normal market forces" (Br. 13). Again, there is no warrant for overturning the Attorney General's factual findings that the competitive struggle was waged "energetically but both responsibly and properly" (JA 151) for the principal purpose of achieving market leadership (*id.* at 152)—precisely the competitive conditions

8. Petitioners argue (Br. 7-8) that a reference in a 1981 Knight-Ridder memorandum to mounting Free Press losses, and to the probability that the paper would qualify as a "failing newspaper," suggests some vague intent to collude with the News in order to secure a JOA. There is no merit to that assertion. The record is clear that the News' owner refused to enter into a JOA in 1981, refused to even discuss a JOA seriously thereafter, and sold the paper in 1985 without having agreed to a JOA. See p. 12 *supra*.

addressed by Congress when it passed the NPA. See pp. 4-6, *supra*.⁹

3. The Free Press did not have to be offered for sale in order to be eligible for a JOA.

The NPA does not require an applicant to attempt to sell a failing newspaper in order to become eligible for a JOA. *Hearst*, 704 F.2d at 475-476 (collecting legislative history). Nonetheless, an *amicus curiae* brief filed in this Court by William D. McMaster, a public relations specialist with no experience in newspaper management, makes grossly inaccurate factual representations (which have no support in the administrative record) concerning the availability of an unidentified "investor group" to purchase the Free Press. In fact, there is no alternative to closure of the paper if a JOA is not soon implemented. See JA 286. Both the ALJ and the Attorney General found that even Knight-Ridder, with its large financial resources and experience in the newspaper business, could not reverse the Free Press' spiraling losses. Pet. App. 122a; JA 145-146; see JA 273.

As Knight-Ridder's CEO testified, "any other owner would be facing the identical problem. The economics do not change because of ownership." JA 273. Indeed, it is absurd to suppose that the Free Press could be extricated from its disastrous financial predicament by being sold to an

9. Petitioners cite the ALJ's statement "that the Free Press had rejected several opportunities to escape the competitive struggle because it believed it could win dominance in the Detroit market, with the JOA as a cushion to fall back on if it failed. Pet. App. 17a-19a." Br. at 28. Among those lost "opportunities" was the refusal of the Free Press to "signal[] the News to 'cool it somewhat' until the [Detroit] economy 'turns up,'" and the fact that the Free Press "seemed to be impervious to any attempts by the News either 'to coach' it into [abandoning advertising discounts], or to change its 'style of competition' by a demonstration of the high cost of continued discounting." Pet. App. 19a & n.37. As the Attorney General properly concluded, this conduct is precisely the type of vigorous price competition favored by the antitrust laws.

owner with shallower pockets than Knight-Ridder. Searching for a new owner who would cast aside the signed JOA only to find that the Free Press' losses cannot be reversed would simply guarantee the paper's demise.

D. The Attorney General's Decision Establishes No Adverse Precedent.

Petitioners also urge disapproval of the JOA because they believe that the Attorney General's decision may serve as a "roadmap" for obtaining JOAs that will "jeopardize healthy newspapers in other cities"—an argument that they raised for the first time in the court of appeals. See Pet. Br. 21, 25-26.¹⁰ Petitioners suggest that the Attorney General approved the JOA merely upon a showing of losses for several years and a statement from the dominant paper that it would not raise prices. They claim that these criteria can be easily satisfied by initiating a "predatory pricing scheme" and securing a promise from a competitor that it will not hike prices. *Id.* at 27. In petitioners' view, the Attorney General would be helpless under such circumstances and would be forced to approve a JOA. This scenario is completely fanciful.

The Attorney General's opinion is not, and cannot be, reduced to the simplistic formula suggested by petitioners. Rather than relying merely upon two factors, the Attorney General canvassed in detail the Free Press' unsuccessful struggle for market leadership and its irreversible economic predicament. JA 143-146. He determined that the Free Press had engaged in keen and lawful competition, motivated by the desire to become the leading paper in Detroit.

10. Profitable junior papers are, in fact, almost non-existent (see p. 4, *supra*). They are threatened not by JOA rulings but by inexorable competitive forces that have existed in nearly every city in the United States throughout this century.

JA 151-152. Plainly, the Attorney General's decision cannot be divorced from its factual underpinnings when considering its precedential significance.

At the heart of petitioners' argument is the implicit assumption that the Free Press should be "more bloodied" (Pet. App. 190a) before being granted relief, apparently to prevent JOAs from becoming too easy to secure. But the facts of this case well illustrate how difficult it is to negotiate a JOA. For years the News rebuffed any proposal for a JOA, despite its own large losses. See p. 12, *supra*. In most markets, there is only a brief and uncertain opportunity to reach a JOA agreement. If a junior paper becomes too weak, the agreement will never be executed: it will "be more advantageous for the dominant paper to let the ailing paper die and enjoy the benefits of a natural monopoly rather than entering a joint agreement." *Hearst*, 704 F.2d at 479 n.10. The difficulties inherent in securing a JOA are compounded by administrative and litigation delay, leaving the junior paper (now branded as a "failing" enterprise) to suffer escalating financial losses, depletion of advertising patronage, and employee demoralization. Pet. App. 42a, 121a.¹¹

11. These practical considerations weigh heavily against the suggestion of Judge Ginsburg (Pet. App. 191a) that this case be "remanded" for further proceedings before the Attorney General. A remand of this already protracted matter would serve no purpose on this record. But it would pose a grave risk to the Free Press and to Congress's goals under the NPA. Sustaining the Free Press during several more years of litigation is more than just a matter of losing immense sums of money. Maintenance of the skilled workforce and employee morale needed to produce a high quality newspaper is enormously difficult once a JOA application has been filed. As the ALJ observed, "once an agreement is announced it has an adverse effect on the morale and performance of the designated 'failing newspaper.'" Pet. App. 42a. While the economic performance of the Free Press was seriously adverse prior to 1986 (see App., *infra*, at A-1 to A-3), it has substantially worsened in the last three years for the reasons stated by the ALJ.

In short, the practical effect of petitioners' effort to raise new obstacles to the JOA approval process would be to render this remedial statute a dead letter. Petitioners' interpretation would severely deter the owners of failing newspapers from pursuing a JOA, placing additional pressure on them to liquidate the junior paper, redeploy its assets, and terminate its losses.

Nor is there merit to petitioners' claim that the Attorney General's decision will encourage "predatory pricing." Petitioners do not bother to explain why a dominant paper, allegedly committed to pursuing long-run profits through short-term losses and capable of "driving an unwilling competitor into a JOA" through low prices (Pet. Br. 26 n.7), would stop there when a little more forbearance would yield a complete monopoly and eliminate any need to share future profits. See *Citizen Publishing*, 394 U.S. at 137-138 (noting that a dominant paper would have little incentive to enter into a JOA if its competitor "was on the brink of collapse"). The long list of papers that have died without being able to negotiate a JOA makes clear that the most attractive alternative for a dominant paper is simply to await the demise of its rival. See, pp. 3-4, *supra*.

In this context, it is particularly irresponsible for petitioners and their supporting *amicus* to suggest that either or both of the Detroit papers engaged in "predatory pricing." Pet. Br. 26-28; Little Rock Br. 16-21. This conclusory charge, raised for the first time when petitioners sought rehearing in the court of appeals (Pet. App. 203a & n. 4), is completely devoid of evidentiary support. No party to the administrative proceeding suggested that the "rare[]" event (Pet. App. 208a) of predatory pricing could be discerned on this record, not even the Antitrust Division, which characterized the Free Press' conduct as part of a "vigorous competitive battle to improve its market position." JA 97. And the Attorney General specifically found that the competition between the papers had been waged "responsibly

and properly" and in full conformity with the law (JA 151, 153).

Most illogical of all is petitioners' bald assertion that "absent the fall-back of a lucrative JOA, there would be no reason for any newspaper to assume the enormous risk of losing money for years in the hope of driving a competitor from the market." Pet. Br. 26. The Newspaper Preservation Act is premised on exactly the opposite view. For decades prior to passage of this statute, newspapers across the nation recognized that losing money to defend against the loss of readers and advertisers is often the only way to avoid second-paper status and financial failure. The "enormous risk" imposed on these papers by competitive conditions caused hundreds of newspaper failures in two-paper cities, leading Congress to approve the JOA alternative. The ALJ expressly noted that experienced newspaper executives at the News and the Free Press believed that the costly pursuit of dominance was the only "rational" business strategy in Detroit. Pet. App. 120a.¹²

What remains is petitioners' final assertion (Br. 27) that a future Attorney General would have no choice but to rubber-stamp a JOA that was part of a "predatory pricing scheme" or that arose from competition that did not aim for commercial success. But the Attorney General's decision demonstrates that this is not true. The Attorney General considered, but rejected as factually unsupported, the claim

12. Petitioners' reference to a "lucrative JOA" apparently stems from their view (Br. 18) that a JOA in Detroit would yield monopoly profits. This argument conveniently overlooks the fact that newspapers presently have such nominal "monopolies" in the overwhelming majority of American cities (see pp. 3-4, *supra*), but their ability to raise prices above competitive levels is restrained by intense and rapidly increasing competition from other news sources and advertising outlets, including broadcast television, cable television, radio, magazines, national papers, non-daily papers, shopper handouts, billboards, electronic publishing, and direct mail. JA 377, 549-555. It overlooks, moreover, that without a JOA the Free Press will close, leaving the News with the very "monopoly" petitioners fear.

that the JOA in this case was the outcome of a scheme to win a JOA rather than vigorous competition. JA 151-152. He imposed the affirmative requirement that the conduct leading to a JOA be consistent with the broad goals of the antitrust laws. JA 150-152. Both the district court and the court of appeals similarly emphasized that publishers pursuing improper pricing strategies will find no safe harbor in the Attorney General's decision. Pet. App. 160a-161a, 189a-190a & n.13. And in this Court, the brief filed on behalf of Attorney General Thornburgh emphasizes that "the Attorney General could deny the application if the record showed that two newspapers had deliberately created operating losses as a means of obtaining a JOA. This could be true even if ultimately obtaining a JOA had not been the exclusive goal of the applicant newspapers." U.S. Br. in Opp. 19.

* * * * *

None of the arguments advanced by petitioners can obscure the proposition that this is a case that turns on its facts. Is it probable that the News will abandon its low prices and remove competitive pressure from the Free Press? Is it probable that the Free Press will remain in business if it must continue to meet the low prices of the News? The Attorney General answered both questions in the negative, and his opinion rests on economic evidence that leaves no doubt that his predictive judgment was a reasonable one. This Court should not retry the factual issues, which have now been settled by the Attorney General, the district court, and the court of appeals. Taking those facts as settled, there is, we submit, no sensible basis for the contention that the Newspaper Preservation Act forecloses relief to the Free Press.

Nor should this Court blind itself to the fact that a great newspaper will surely die if the JOA is denied (see U.S. Br. in Opp. 5 n. 4), a result that would subvert the policy expressly declared by Congress in the NPA. Founded in 1831, the Free Press has addressed national and local issues

of the day with independence and integrity. And it brings to the Detroit community an editorial and reportorial viewpoint that is distinct from that of the News. From political endorsements to race relations, the Free Press' progressive viewpoint presents an ongoing debate with the News. The debate that the two newspapers bring to the people of Detroit is of inestimable value to the political process and the goals secured by the First Amendment.

The Congress that passed the Newspaper Preservation Act would not want this newspaper to die or to sacrifice the jobs of its 2,100 employees. The literal language that it used in the Act makes that intention inescapably clear. In these circumstances, this Court should sustain the decision of the Attorney General in accordance with the rulings of both courts below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

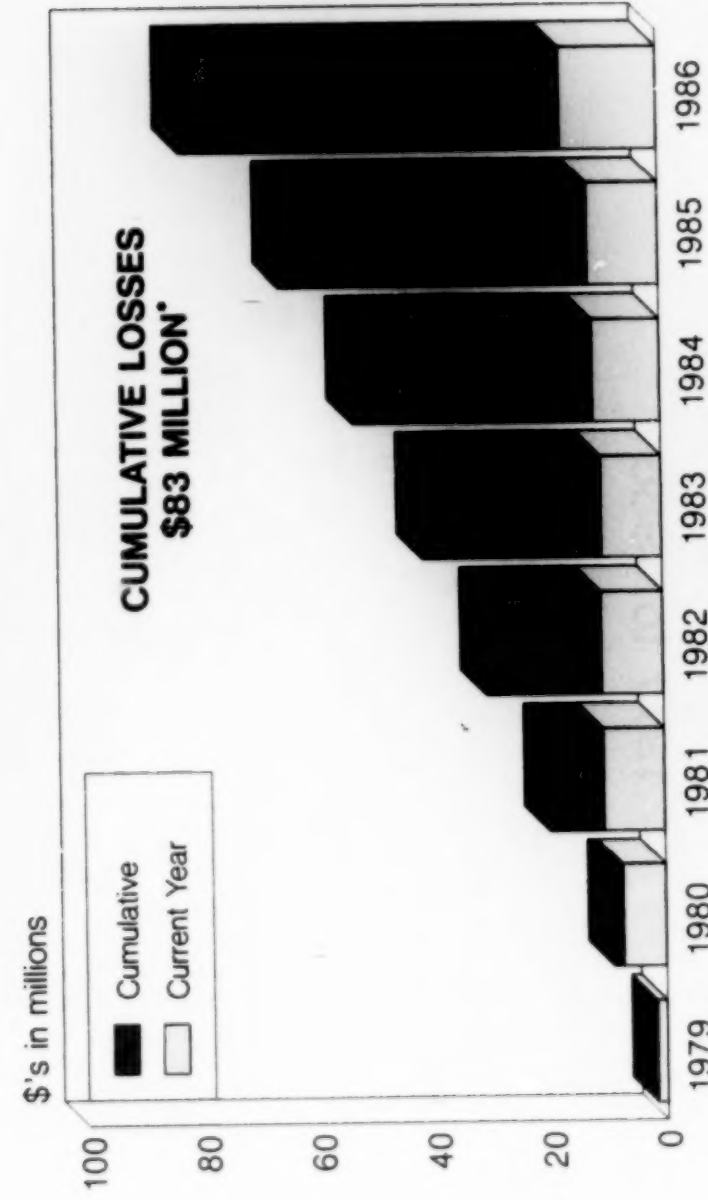
CLARK M. CLIFFORD
Counsel of Record
 ROBERT A. ALTMAN
 ROBERT P. REZNICK
 ROBERT C. SANDERS
 CLIFFORD & WARNKE
 815 Connecticut Ave.
 Washington, D.C. 20006
 (202) 828-4200

STEPHEN M. SHAPIRO
 ANDREW L. FREY
 KENNETH S. GELLER
 ANDREW J. PINCUS
 MAYER, BROWN & PLATT
 2000 Pennsylvania Ave., N.W.
 Washington, D.C. 20006
 (202) 463-2000

DATED: AUGUST 1989

APPENDIX

FREE PRESS OPERATING LOSSES 1979 to 1986

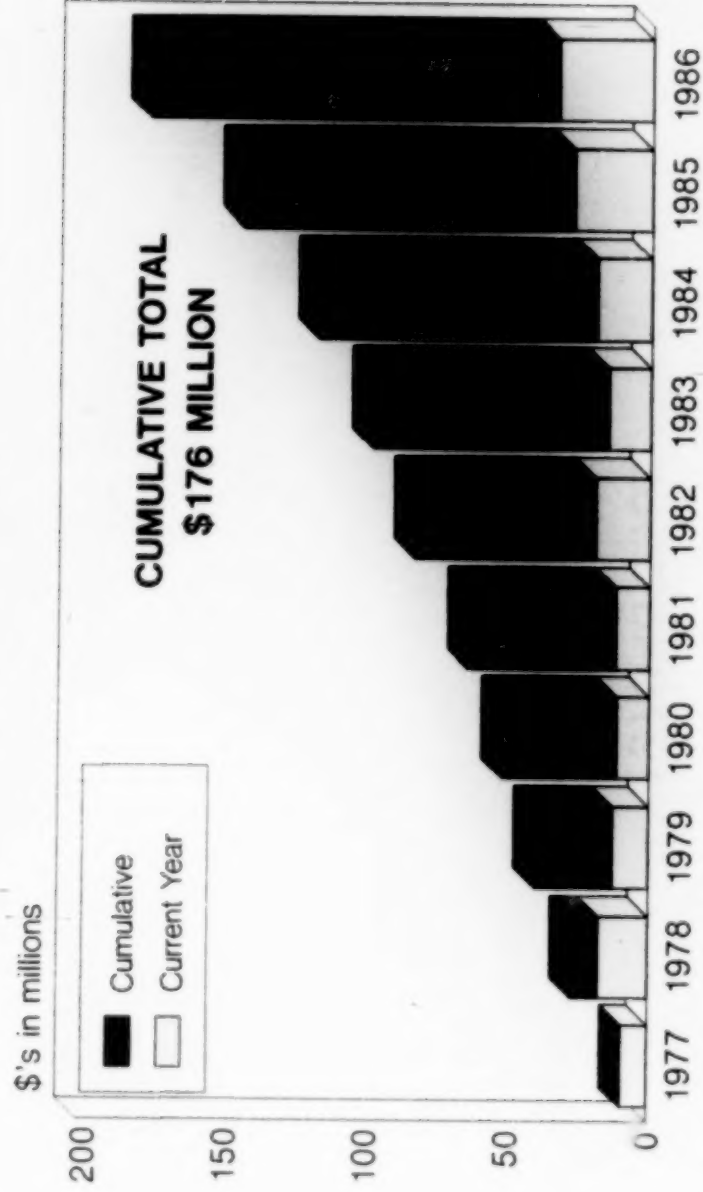


*From 1979 to 1986, cumulative losses for The News were \$48 million.

Source: NX 603A; NX 615A

KNIGHT-RIDDER CASH ADVANCES TO THE FREE PRESS 1977 to 1986

A-2



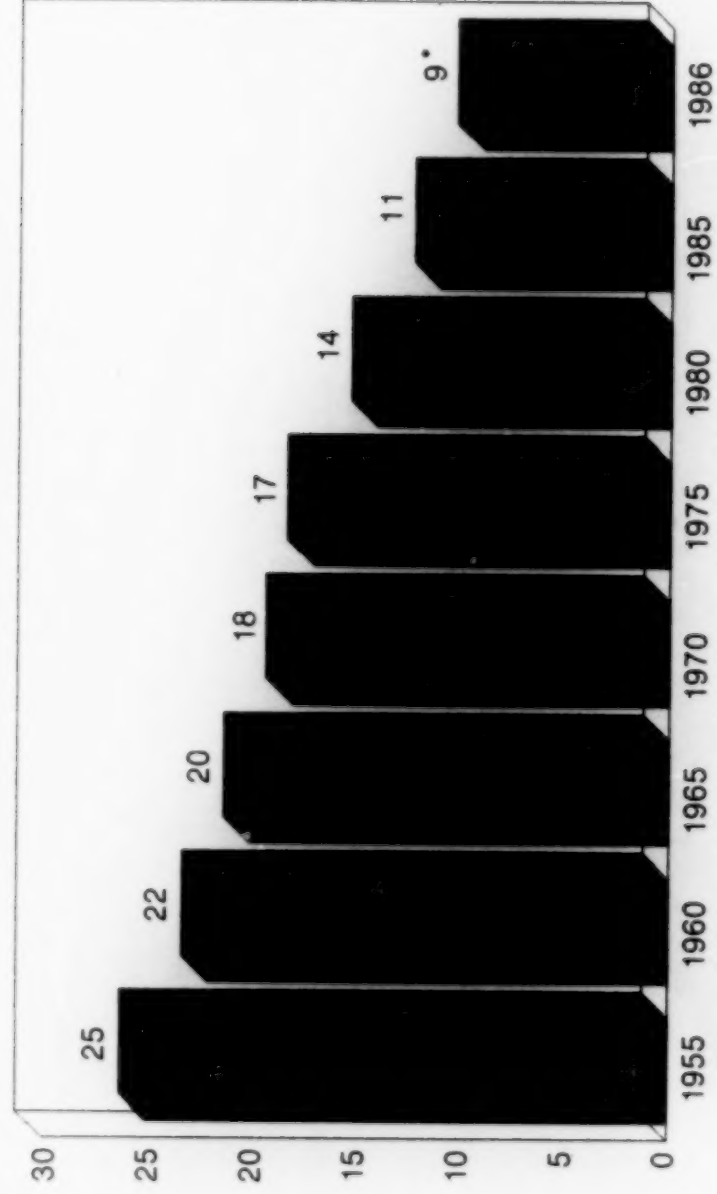
Source: NX 603C; JA 531

A-3

1986 LEAD OF NEWS OVER FREE PRESS IN RELEVANT ECONOMIC CATEGORIES

	NEWS	FREE PRESS	NEWS LEAD
TOTAL REVENUE (1)	\$229,630,000	\$168,310,000	\$61,320,000
ADVERTISING REVENUE (1)	\$190,725,000	\$121,428,000	\$69,297,000
TOTAL ADVERTISING LINAGE (2)	54,653,821	34,653,944	19,999,877
(1) NX615A and NX603A			
(2) NX2R			

CITIES IN THE 30 LARGEST U.S. MARKETS HAVING TWO OR MORE COMMERCIAL COMPETITIVE NEWSPAPERS

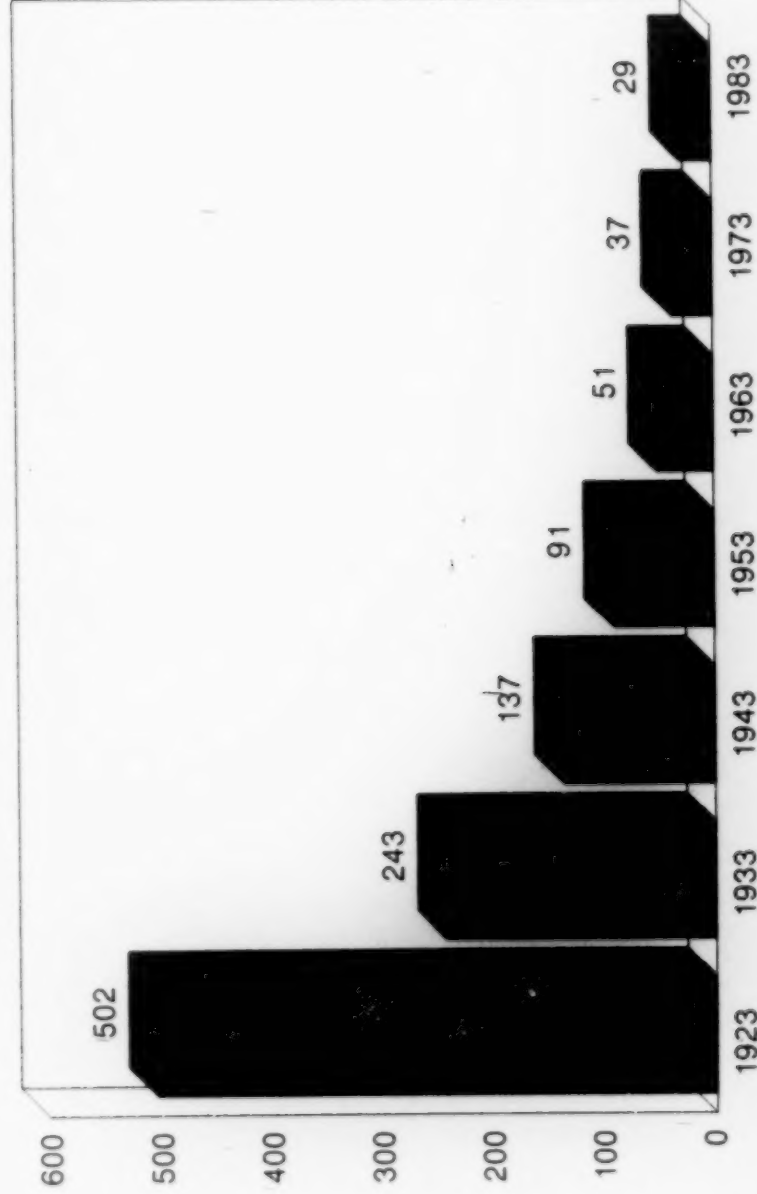


*The second newspaper in seven of these nine markets operated at a loss.

Source: JA 537-40

A-4

TOTAL U.S. CITIES HAVING TWO OR MORE COMMERCIAL COMPETITIVE NEWSPAPERS



Source: JA 590

A-5

20

Supreme Court, U.S.

FILED

SEP 11 1989

No. 88-1640

WILLIAM F. BRYAN, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, *et al.*,

Petitioners,

v.

DICK THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

September 11, 1989

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES.....	ii
1. The Experience of Newspapers That Have Failed in Other Cities Has No Applicability to Detroit.....	2
2. The Free Press and the News Are Competitive Equals.....	4
3. The Applicants Have Not Demonstrated That the Free Press Is in Probable Danger of Financial Failure or That Approval of the JOA Is Consistent With the Purposes of the Act.....	9
4. The Court of Appeals' Incorrect Reliance on <i>Chevron</i> , to Avoid Application of the Antitrust Rule Requiring Narrow Construction of the Act, Provides an Additional Reason for Reversing the Decision Below	15
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases:	Page:
<i>Associated Press v. United States</i> , 326 U.S. 1 (1944).....	13
<i>Cargill, Inc. v. Monfort of Colorado, Inc.</i> , 479 U.S. 104 (1986).....	10-11
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	<i>passim</i>
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969).....	11, 13
<i>Committee for an Independent P-I v. Hearst</i> , 704 F.2d 467 (9th Cir.), <i>cert. denied</i> , 464 U.S. 892 (1983)	17
<i>Dawson Chemical Co. v. Rohm & Haas Co.</i> , 448 U.S. 176 (1980)	17
<i>Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.</i> , 346 U.S. 537 (1953)	12
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	17
Other Authorities:	
Barnett, <i>Detroit's high-stakes 'failure' game</i> , XXVI Columbia Journalism Review 40 (Jan./Feb. 1988)	14
Calkins, <i>Developments in Antitrust and the First Amendment: the Disaggregation of Noerr</i> , 57 Antitrust Law Journal 327 (1988)	13
Morton, <i>Dueling Dailies: A Short History</i> , 10 Washington Journalism Review 48 (Nov. 1988)	3

Page:

Report of the Assistant Attorney General, Public File No. 4403-13 (1989) (York).....	9
15 U.S.C. § 1801	3
15 U.S.C. § 1802(5)	3
15 U.S.C. § 1803(b)	3

IN THE
Supreme Court of the United States
October Term, 1988

No. 88-1640

MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, *et al.*,

Petitioners,

v.

DICK THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

The fundamental inconsistency in respondents' briefs is that, while claiming that petitioners are relitigating facts found by the Attorney General, they have relied principally on record evidence to reach conclusions that the Attorney General never adopted. Indeed, many of their factual arguments were rejected by the Administrative Law Judge ("ALJ"), all of whose findings the Attorney General explicitly "accepted as accurate." Pet. App. 147a. Thus, it is respondents who are attempting "to retry factual issues, which have now been

settled by the Attorney General." See Detroit Free Press ("Free Press") Br. 49.¹

In this reply, we demonstrate that respondents' factual arguments do not provide a basis for avoiding the two questions on which this Court granted certiorari. Section 1 shows that respondents' argument that junior papers in other cities have inevitably failed is both factually inaccurate and has no applicability to Detroit, and section 2 demonstrates that respondents' argument that the financial condition of the Free Press has been seriously weakened, in contrast to that of The Detroit News ("News"), is completely refuted by the findings of the ALJ and the Attorney General.

In section 3, we demonstrate that the Free Press did not satisfy the "probable danger of financial failure" standard in the Newspaper Preservation Act ("NPA") because respondents failed to establish that the News will retain its unprofitably low prices if the joint operating agreement ("JOA") is denied, and that approval of the Detroit JOA would undermine Congress's central goal of preserving commercial competition in markets that can sustain more than one independent newspaper. Finally, in section 4, we demonstrate that the court of appeals' application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to override the rule that exemptions from the antitrust laws must be narrowly construed also constitutes reversible error.

1. The Experience of Newspapers That Have Failed in Other Cities Has No Applicability to Detroit.

To support their claim that the Detroit Free Press is in "probable danger of financial failure," respondents argue at length that absent a JOA the Free Press will close because in every market,

¹The briefs of the Free Press and the Attorney General contain numerous citations to testimony and exhibits that were neither relied on nor adopted by the Attorney General. Since Attorney General Meese, whose decision this Court is reviewing, cited only the ALJ's Recommended Decision and not any other evidence in the record, we have relied on his decision and that of the ALJ, but not on testimony or exhibits submitted during the administrative hearing.

including Detroit, the junior newspaper has failed or inevitably will fail. Free Press Br. 3-6, 36, 45 n.10; News Br. 3-19, 30; Attorney General ("AG") Br. 3, 5-6, 36. That argument cannot sustain the JOA here because it is inconsistent with the rulings of the Attorney General, the ALJ, and the basic premise of the NPA.

Attorney General Meese, in the decision respondents purport to defend, seriously undercuts respondents' inevitability argument by concluding that "it is the case, as the Administrative Law Judge found, that the Detroit market *could* sustain two profitable newspapers if both circulation and advertising prices were increased." Pet. App. 143a (emphasis in original; citations omitted). ALJ Needelman directly addressed the argument that junior papers inevitably fail and rejected it, finding the "notion that the junior paper faces inevitable extinction [to be] ambiguous at best since the designations 'dominant' and 'junior' are not etched in stone." Pet. App. 109a n.259. According to Judge Needelman,

[t]his is best seen in Philadelphia where the Knight-Ridder papers overcame a substantial daily circulation lead (and six years of losses) to triumph over the rival *Bulletin*. [I]n San Francisco the roles of 'junior' and 'dominant' were reversed despite scale economies. There is also some evidence that in recent years junior papers have been able to prosper in large metropolitan areas. Besides, the very notion of the inevitable demise of a junior paper loses some of its force as applied to Detroit where the 'junior' and 'senior' papers have been fighting it out for almost 27 years and during most of that time both were profitable.

Id. In fact, junior newspapers in Washington (*Washington Post*), Anchorage (*Anchorage News*), and Chattanooga (*Chattanooga News-Free Press*) have become senior. Morton, *Dueling Dailies: A Short History*, 10 Washington Journalism Review 48 (Nov. 1988).

Moreover, Detroit is the nation's fifth largest newspaper market. Even if the Free Press were a "junior" paper, which it is not (see pp. 4-9, *infra*), the experience in other, smaller cities, of newspapers

with smaller circulation and advertising revenue, is not applicable. As Judge Needelman pointed out, "[o]nly one larger metropolitan area (Philadelphia) does not now have two competing newspapers, and several markets smaller than Detroit support newspaper competition." Pet. App. 87a.

Finally, respondents' argument proves too much. If Congress had believed that the second newspaper in a competitive market must inevitably fail, then the requirement that the Attorney General examine the financial status of the applicants and determine that one of them is in "probable danger of financial failure" would have been superfluous. Instead, Congress would have drafted a statute that conferred the exemption on any two newspapers in a competitive market, that sought a JOA. Thus, respondents' construction of the NPA would nullify the basic statutory standard that Congress so carefully drafted (Pet. Opening Br. 16-20), as well as the requirement that the Attorney General find that granting a JOA is consistent with the purposes of the NPA. 15 U.S.C. §§ 1801, 1803(b).

For all these reasons, the Attorney General's decision cannot be sustained on the basis of the argument most strenuously pressed by respondents — that the experience of newspapers in other cities demonstrates that the Free Press cannot survive.

2. The Free Press and the News Are Competitive Equals.

Respondents portray the Free Press as a financial "shell" about to succumb to the News, which they argue is dominant in all important categories. See, e.g., Free Press Br. 1, 29. This picture is not supported by the record below, nor by the findings of the ALJ and the Attorney General.

First, respondents either ignore or bury the finding that the News has also suffered deep losses, "almost as severe as the Free Press's." ALJ Recommended Decision at Pet. App. 121a. This fact alone distinguishes Detroit from every JOA application that the Attorney General had previously approved. Historically, a dominant newspaper sought a JOA with a junior paper that was in a downward spiral and that had been losing money for many years. AG Deci-

sion and Order at Pet. App. 141a; see also *id.* at 146a (Congress's "frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the 'downward spiral' phenomenon due to external market forces").

Second, the Free Press was dominant in the critical morning market. Indeed, this factor had prompted John Morton, the expert retained by the *applicants* for the hearing, to conclude that the Free Press was more likely to prevail than the News. As Judge Needelman recounted, Morton had predicted in an article, published only two months before the newspapers applied for a JOA, that:

if the Detroit newspaper war was to continue the News was 'at greater risk' than the Free Press. Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News.

ALJ Recommended Decision at Pet. App. 112a, *quoting* Morton article (citations omitted). "Even after the JOA was announced in April 1986," according to Morton, "the Free Press [was.] doing better than the News." *Id.* Morton believed that "if everything remained equal and the Free Press remained the morning newspaper and the News remained the afternoon newspaper, basically in the long run that would catch up with the News." *Id.*

Third, the ALJ found that the Free Press and the News were competitive equals at the time they filed their JOA application. They had battled for more than 25 years, both making a profit until 1979, "without either moving toward a position of market dominance." AG Decision and Order at Pet. App. 140a. By April 1986, they had fought "to a virtual draw." ALJ Recommended Decision at Pet. App. 31a; see also *id.* at 31a-85a. "At the highest levels of Knight-Ridder management, the view was held that '[t]he newspapers have fought to a standstill.'" *Id.* at 31a n.93 (citations omitted).

Moreover, by every important measure, the Free Press either had held its ground or was gaining on the News. Between 1960

and 1976, it continuously gained ground in circulation, and "b[y] 1976, the daily circulation battle ha[d] been fought to a virtual tie." *Id.* at 40a-41a. Although the News initiated a morning edition in 1976, in 1986 the Free Press still "maintain[ed] its huge leadership in the critically important field." *Id.* at 55a (footnote and internal quotations omitted). After 1976, "the Free Press's share of total daily circulation [morning and afternoon] never fell below 49%." *Id.* at 40a-41a. By the time they negotiated the JOA, the Free Press's circulation revenues exceeded the News's, as did its overall readership. *Id.* at 55a, 58a. Indeed "on or about the date of the announcement of the JOA, the Free Press had all but eliminated the News's daily circulation lead," which the News "had only been able to hold by discounting its already low cover prices." *Id.* at 42a, 120a.

Although the News had maintained its lead in advertising, here too the "Free Press ha[d] improved [its] share of the field over time." *Id.* at 33a, 36a. By April 1986, when the newspapers applied for a JOA, "the News's advertising lead, which the News had only been able to hold by severe discounting, was vulnerable to a change in the circulation lead." *Id.* at 120a.

The newspapers' equal division of the JOA profits is also compelling evidence that they perceived themselves to be competitive equals. The Free Press argues that it surrendered control for a larger share of the profits than it could otherwise have obtained, but Judge Needelman, and therefore the Attorney General, rejected that argument. As the ALJ explained, "on major issues of governance . . . Gannett has no effective control since nothing can be done without Knight-Ridder approval." *Id.* at 114a. He further found that "the profit split was not based on the question of control but instead reflected the crucial importance of the morning franchise." *Id.*

Fourth, the respondents have presented a totally one-sided picture concerning the strengths and weaknesses of the two newspapers. While they are correct that the News was ahead in some important categories, they ignore other areas of the Free Press's strength that were identified by the ALJ. In addition to its clear

dominance in the morning market, the Free Press had made dramatic gains in the city zone, retail trade zone, and the primary market area, which are the "key areas" that "retail and classified advertisers are most interested in." *Id.* at 44a.² In the Sunday edition, it also outgained the News by almost three to one in all three areas. *Id.* at 34a, 48a-49a.

In response, the Free Press argues that it would have entered a downward spiral, losing ground in circulation and advertising, without a subsidy from its parent, Knight-Ridder. Free Press Br. 9-12. However, as Chief Judge Wald noted, "[t]he ALJ found that the Detroit situation was not one of a 'junior' newspaper valiantly trying to retain a foothold in the market, and that the characteristic elements pushing one paper into a 'downward spiral' did not exist." Pet. App. 206a n.1 (citations to majority opinion omitted). "Nor," according to the Attorney General, did "there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial 'downward spiral' that is fatal to survival." Pet. App. 207a n.2.³

²During the five years prior to negotiating for a JOA, the Free Press had added 38,870 to its daily circulation in the city zone and retail trade circulation zones, while the News had made no gains in those locations. *Id.* at 33a-34a. During a similar period of time, the Free Press's share in the primary market area grew 36,000 while the News lost 22,000. *Id.* at 45a.

³In 1983, the Free Press "projected from an economic model that under conditions of 'normalized competition,' the Free Press would earn \$1.5 million per year and the News \$5 million." ALJ Recommended Decision at Pet. App. 97a. In addition, the Free Press had had opportunities to abandon its drive for dominance and to return to profitability. However, "[o]nce the struggle intensified, the Free Press seemed impervious to any attempts by the News either 'to coach' it into returning to card rates by intermittent lulls in the severity of discounts or to change its 'style of competition' by a demonstration of the high cost of discounting." *Id.* at 19a n.37 (citations omitted). It is relevant that Gannett's "pricing strategy was also motivated by the realization that any increase in circulation price might jeopardize the JOA by putting the Free Press into the black." *Id.* at 91a. Finally, the Free Press's daily circulation prices are

(footnote continued)

The Free Press also relies on the requirement in the NPA that its financial performance be evaluated on a stand-alone basis, 15 U.S.C. § 1802(5). Br. 35. But as Judge Needelman found, this provision "cannot be transformed into a requirement that one must be oblivious to the obvious point that the Free Press's financial condition was traceable to the parent's strategy of striving for future market dominance and profitability (or a JOA) at the expense of present profits." Pet. App. 128a. For example, in 1985, Knight-Ridder approved \$22.3 million for expansion of the Free Press's Riverfront Plant, based on "projections [that] did not foresee operating profits until at least 1990 and under some scenarios even later." ALJ Recommended Decision at Pet. App. 25a. Nevertheless, "[b]ecause the Riverfront Plant expansion was not completed until December 1986, the added capacity deemed so essential for the confrontation with the News was not even available to the Free Press until six months after the JOA application was filed." *Id.* at 27a (footnote omitted). Since Knight-Ridder's deep pocket was an essential component of the corporate strategy that led to the losses in the first place, the claim that the Free Press could not continue to sustain those losses without Knight-Ridder's assistance is not a basis for awarding it an antitrust exemption.

Finally, the Free Press claims that its financial condition "has substantially worsened in the last three years" (Br. 46 n.11), and the *amici curiae* supporting its position repeatedly state that Knight-Ridder's Board of Directors has threatened to close the Free Press unless the JOA is granted. However, the Attorney General correctly held that, since "these maneuvers occurred after close of the record," they may not be considered in evaluating the JOA application. J.A. 150 n.4. In any event, the deterioration of the Free Press after the papers applied for a JOA would be expected since the designation of a newspaper as "failing" may have "an adverse effect on [employee] morale and performance" of a newspaper. ALJ

5 cents above the News's, and it offers a smaller advertising discount than the News. AG Decision and Order at Pet. App. 141a-43a. Thus, there is no basis for respondents' argument that the Free Press's losses were caused by price reductions that were necessary for it to retain its market position.

Recommended Decision at Pet. App. 42a. Thus, as the Antitrust Division recently held in evaluating another application, such a decline may not be considered in determining whether the newspaper qualifies for a JOA.⁴

In any event, the Free Press's claim of recent deterioration is open to serious question in light of the full-page self-promotions that it has recently published. See Brief of *Amicus Curiae* of Little Rock Newspapers, Inc., Appendix A. Entitled "Drawing Power," the ad states that "[t]he Free Press is the newspaper gaining momentum in metro Detroit" and has "outgained the News in the metro area — two-to-one daily and by an even greater margin on Sunday during the past six months." This achievement is extraordinary in light of the contrary experience of other papers designated as failing for purposes of the NPA, and it demonstrates the strength of the Free Press. For all these reasons, the record plainly demonstrates that, at the time they applied for a JOA, the Free Press and the News were competitive equals.

3. The Applicants Have Not Demonstrated That the Free Press Is in Probable Danger of Financial Failure or That Approval of the JOA Is Consistent With the Purposes of the Act.

A. In approving the JOA, the Attorney General relied heavily on the ALJ's finding that the Free Press could not unilaterally return to profitability. Pet. App. 141a, 142a. According to both fact-finders, the Free Press could not increase its circulation or advertising prices without a loss in market share unless the News also raised its prices. Therefore, the News could prevent the Free Press from becoming profitable. But the News was also in this predicament, since it too would continue to lose large sums of money until both newspapers raised their prices. Pet. App. 122a, 140a-44a.

⁴Report of the Assistant Attorney General, Public File No. 4403-13, pp. 18-19 (1989) (application of York, Pa. newspapers) ("Because Congress did not intend to allow JOAs that could reasonably have been avoided, the Antitrust Division's analysis gives no weight to any adverse effect that may ensue from the JOA filing itself.").

Nevertheless, Attorney General Meese accepted the applicants' argument that the News would not raise its prices, even though such a course would insure that it would continue to suffer deep losses. Pet. App. 143a. To support this finding, he relied *solely* on the self-interested statements of Gannett officials, although he did not cite their testimony or any other evidence that the applicants had introduced. Instead, the Attorney General only cited the ALJ's explanation of why this testimony could *not* be believed, namely that Gannett's witnesses "never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies." *Id.*; ALJ Recommended Decision at Pet. App. 92a. Indeed, Attorney General Meese did not actually conclude that the News *would* maintain its below-cost pricing; he simply stated that such a course would not "reflect unsound business judgment." *Id.* at 143a.

The Attorney General's decision is further undercut by its inconsistency with other, contrary findings made by the ALJ, which the Attorney General implicitly accepted, but to which he never responded. Judge Needelman had found that the 50/50 profit split "represents a perception by Gannett that there can be neither [a] clear winner nor a clear loser for at least seven years" if competition were to continue. *Id.* at 122a. Viewed in this time frame, as Chief Judge Wald pointed out below, Attorney General Meese's prediction "makes no economic sense" because it assumed that the News would continue to lose money for an essentially indefinite period of time. Pet. App. 205a. While the current Attorney General argues in his brief that it was "rational" for the News to refuse to raise prices in the absence of a JOA (Br. 32), his argument assumes that the News would not follow the Free Press's lead, even though such a price rise would also be essential to the News becoming profitable. Nor does he reconcile the testimony of Gannett officials that they would continue to lose money, in order to force the Free Press to close, with the Justice Department's view that predatory pricing schemes are inherently unlikely to succeed. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 &

n.17 (1986); *see also* Pet. App. 208a n.4. Finally, the applicants have not cited any evidence in the administrative record or elsewhere that demonstrates that a dominant newspaper has succeeded in eliminating its competitor with a below-cost pricing strategy.⁵

Thus, as a matter of law, a newspaper cannot demonstrate that it is in "probable danger of financial failure" on the ground that it will continue to lose money until its competitor raises prices, where the competitor also will continue to suffer deep losses as long as it continues to price below its costs, particularly where the newspapers are competitive equals. In any event, the Attorney General's central finding that the News will not raise its prices for the foreseeable future, even if the JOA is denied, cannot be sustained because it is arbitrary and capricious.

The Free Press argues that the test that petitioners have advocated would reinstate the failing company standard of *Citizen Publishing Co. v. United States*, 394 U.S. 131, 133 (1969), where this Court required that one paper be "about to go out of business" in order for the parties to a JOA to avoid liability under the antitrust laws. Free Press Br. 37. However, all of the other post-1970 JOAs that the Attorney General has approved would still be valid under petitioners' interpretation of the NPA. Thus, all of those decisions involved one newspaper in a downward spiral (Pet. App. 141a), and none involved a "failing" paper that could become profitable if prices were increased. An additional factor distinguishing those applications is the profit splits, which ranged from 80%/20% to 68%/32%, indicating that the applicants were not competitive equals. *See* ALJ Recommended Decision at Pet. App. 113a n.277. Accordingly, petitioners do not advocate that the Court should reinstate the *Citizen Publishing* standard, but instead that it hold that the NPA prohibits

⁵On the other hand, it would be rational for the dominant paper to cut prices if a JOA were available as a fall-back in the event that the competitor was not forced to close. As described in the *Amicus Curiae* brief filed by Little Rock Newspapers, Inc. (Br. 2, 5a), just six days after Attorney General Meese's decision, but prior to the time this case was filed, Gannett slashed the price of the *Arkansas Gazette*.

the Attorney General from approving a JOA for newspapers that are competitive equals in a market where both papers could make a profit if pricing became "rational and consistent with other markets around the country." ALJ Recommended Decision at Pet. App. 96a (quoting Free Press management).⁶

B. Respondents Attorney General and Free Press acknowledge that, even if they had demonstrated that the Free Press is in probable danger of financial failure, approval of the JOA must also effectuate "the policy and purpose" of the NPA. AG Br. 19; Free Press Br. 8. However, the Free Press argues that the NPA was not intended to preserve commercial competition, but rather "to effectuate the First Amendment goal of preserving competition in ideas." Free Press Br. 42 (internal quotation omitted). In the Free Press's view, that interest is adequately preserved by the joint operating agreement which provides that the newspapers will have separate news and editorial staffs.

Respondent's effort both to limit the Congressional intent to First Amendment considerations and to argue that a JOA will not affect newspaper content is untenable. Congress's concern about unduly limiting commercial competition is demonstrated by its decision to draft a tighter definition for future JOAs than for those already in existence in 1970, and to require review by the Attorney General. See Pet. Opening Br. 16-20. In any event, under the JOA, "competition in ideas" will be diminished since there will be no economic incentive to compete in news-gathering or editorial positions, and on Saturday and Sunday, when the newspapers will publish joint editions, competition will be eliminated altogether. As Chief Judge Wald explained, the "[l]egislative history [of the NPA] suggests that Congress wanted to preserve as many 'reportorially indepen-

⁶The Free Press's argument that the antitrust laws would prohibit a collusive price increase is beside the point. These laws do not prohibit competitors from independently raising prices, as these two papers have done on several occasions, including one instance where they raised prices on the same day (ALJ Recommended Decision at Pet. App. 88a-89a). See, e.g., *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1953).

dent and competitive' newspapers as possible, 15 U.S.C.A. § 1801 (congressional declaration of policy), but, recognizing that some markets in which two or more newspapers presently existed could support only one daily, sought to retain as much of the disappearing paper's voice as possible." Pet. App. 209a-10a (emphasis in original). Thus, Congress did not find that newspapers that operate under a JOA are comparable to those that operate independently, but only that a JOA would be preferable to a single, monopoly publication.⁷

Therefore, any interpretation of the NPA that allows newspapers in healthy markets intentionally to incur losses in order to qualify for a JOA would be contrary to the underlying purpose of the Act. Yet in approving the JOA, the Attorney General relied only on factors over which respondents had complete control: the losses that the newspapers have suffered because they have priced their product below market rates; the self-serving testimony of Gannett officials that they will not raise their prices; and Knight-Ridder's threats, repeated in the Free Press's brief and in the briefs filed by its *amici curiae*, to close the Free Press unless the JOA is granted. Pet. App. 141a-44a.

Thus, the Attorney General's opinion condones the newspapers' "boot-strap" strategy of using their own predictions about what will happen in the future to prove that the Free Press is now failing. Calkins, *Developments in Antitrust and the First Amendment: the Disaggregation of Noerr*, 57 Antitrust Law Journal, 327, 377 (1988). As Professor Calkins explains, "[l]eft unchanged, the [Attorney General's] decision is an invitation to newspapers in two-paper cities to engage in predation, comforted by the knowledge that the reward for failure may be a JOA." *Id.* at 378; see also

⁷Nor, as this Court held in *Citizen Publishing Co. v. United States*, *supra*, 394 U.S. at 139, do restraints imposed by joint operating agreements "have [any] support from the First Amendment." See also *Associated Press v. United States*, 326 U.S. 1, 20 (1944) ("Surely [the First Amendment] does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.").

Barnett, *Detroit's high-stakes 'failure' game*, XXVI Columbia Journalism Review 40 (Jan./Feb. 1988).

The News appears to agree with this analysis, although it claims that granting a JOA under such circumstances would be consistent with Congressional intent. Br. 33-34, 38. In contrast, the Free Press appears to agree that petitioners' scenario might be inconsistent with the purposes of the NPA, but it relies on the Attorney General's representation that he "could deny the application if the record showed that the two newspapers had deliberately created operating losses as a means of obtaining a JOA." Br. 49. As the district judge pointed out, however, this formulation of the issue is a "straw man" because the central concern of both the Antitrust Division and the ALJ was that both papers had engaged in the risky strategy of seeking dominance "secure in the belief that failure too had its reward in the form of JOA approval." Pet. App. 160a (internal quotations omitted).

The Attorney General also argues that this JOA will not serve as a precedent because the Detroit market "has its own particular characteristics that are not likely to be replicated elsewhere." Br. 38. However, his claim that the circulation rates for both newspapers are "apparently highly price sensitive" (*id.*) was not adopted by Attorney General Meese, the ALJ, or either court below, and, in any event, is not supported by the record citations that he has provided. Moreover, his argument that the newspapers cut their prices because of the 1979-84 recession is not supported by the findings of the other decision-makers in this case, who instead concluded that the low prices were caused by the papers' goal of achieving dominance or a JOA as a fallback. Pet. App. 132a-33a (ALJ: "losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expectation that failure to achieve these goals would result in favorable consideration of a JOA application"); 146a (Attorney General Meese: "strategy followed by both papers . . . for nearly a decade [indicates that Knight-Ridder was] principally pursuing [the goal of] market domination"); 163a (District Court: "the Free Press was primarily motivated by competitive

aims"); 172a (Court of Appeals: "[o]ver the past fifteen years, the papers have been engaged in fierce competition for absolute dominance of the Detroit market"). Thus, the "peculiar circumstances" on which the Attorney General relies to distinguish this case are not a basis for affirming the decisions of either Attorney General Meese or the court of appeals.

To the contrary, it is likely that any future applicant will have a much stronger case for a JOA, and therefore, if this JOA is sustained, it will be impossible as a practical matter to reject future applications from newspapers that lost money because of low prices. Under the Attorney General's opinion, an applicant would only need to show substantial losses and that its profitability was dependent on a price rise by its competitor, which would not occur. Establishing that the competitor would not raise prices could easily be accomplished through the same kind of self-serving testimony of one of its officials, as was used here.

Thus, the Attorney General's decision is likely to encourage competing newspapers in other cities to engage in destructive price competition designed to achieve dominance or an extremely lucrative joint operating agreement. As Chief Judge Wald pointed out, this would "make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place." Pet. App. 210a. For this reason, approval of the Detroit JOA is contrary to the fundamental purpose of the Newspaper Preservation Act.

4. The Court of Appeals' Incorrect Reliance on *Chevron*, to Avoid Application of the Antitrust Rule Requiring Narrow Construction of the Act, Provides an Additional Reason for Reversing the Decision Below.

In our opening brief, we demonstrated that the court of appeals had concluded that it could not sustain the Attorney General's decision unless it granted him great deference, in light of the rule requiring narrow construction of antitrust exemptions. We also

demonstrated that the court of appeals had improperly used this Court's decision in *Chevron v. Natural Resources Defense Council*, *supra*, to excuse the Attorney General from applying the antitrust rule. Pet. Opening Br. 29-39.

In response, the Attorney General states that "on consideration, we do not believe that any *Chevron* issue is presented" in this case. AG Br. 23, 42. Although the statement suggests that this was the first time that the Attorney General had considered the applicability of *Chevron*, the record demonstrates that it represents a sharp reversal of the Justice Department's position. It is also wrong.

In their briefs in the court of appeals, both the Attorney General and the Free Press identified this Court's decision in *Chevron* as an "[a]uthorit[y] chiefly relied upon." At oral argument, Judge Silberman, who authored the majority opinion, made it clear that he viewed the question of whether *Chevron* allowed Attorney General Meese to ignore the antitrust rule as central to whether the Attorney General's decision should be upheld:

QUESTION [Judge Silberman]: I hope, Mr. Letter, you realize there was a \$64 question that Judge Ginsburg and I put to Mr. Clifford, the answer of which I think, if his answer is correct, you probably lose the case.⁸

MR. LETTER [Counsel for the Attorney General]: Your Honor, I think it's a \$64,000 question and —

QUESTION: Maybe \$64 million.

MR. LETTER: . . . In answer, I believe to Judge Silberman's question, I would have said that *Chevron* is directly on point here, it is a Supreme court decision that tells us what does the arbitrary and capricious standard in the APA mean, and it says that when the Attorney

⁸Mr. Clifford had agreed that the Attorney General was required to apply the rule that exemptions from the antitrust laws must be narrowly construed and had declined to argue that *Chevron* had "any important impact" on the issue. Oral Argument Tr. 46-48.

General interprets a statute in a particular way, you must pay essentially total deference to that if the statutory language is vague, you have no authority to step in and—

Oral Argument Tr. 54-55.

According to Judge Silberman's majority opinion, "[t]his is precisely the paradigm situation *Chevron* addressed." Pet. App. 181a. Judge Silberman also found that *Chevron*'s "restraining leash" required the court to uphold the Attorney General, even if the Attorney General's construction of the NPA was inconsistent with the antitrust rule. Pet. App. at 200a. As we pointed out in our opening brief, that approach to construing the NPA was inconsistent with the position that had been previously adopted by the Justice Department, and by the Ninth Circuit in *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, *cert. denied*, 464 U.S. 892 (1983). Pet. Br. 29.

Respondent Attorney General also misstates the *Chevron* issue in this case: petitioners' argument is not that the Attorney General was "requir[ed] to explain that he had applied the recognized canon of statutory construction that exemptions from the antitrust laws must be narrowly construed." AG Br. 44. Instead, we contend that the court of appeals erred in holding that *Chevron* required it to defer to the Attorney General even if his construction of the Act was at odds with the rule. The decision below, allowing administrative agencies to broadly construe antitrust exemptions, could have a serious impact on numerous exemptions from the antitrust laws. See Pet. Opening Br. 35 & n.12. Such a change in the law would upset settled expectations of Congress, regulated industries, and the public, since these antitrust exemptions were adopted at a time when the antitrust rule requiring narrow construction was firmly embedded in our jurisprudence.

We agree with the Free Press that the issue here is ultimately one of congressional intent. But in our view, the contrast between the pre-1970 and post-1970 standards, Congress's reference to *United States v. Third National Bank*, 390 U.S. 171 (1968), the burden of proof which the Justice Department agrees the applicants

must bear, and the NPA's legislative history all demonstrate that Congress intended that the antitrust exemption would be narrowly construed. *See* Pet. Opening Br. 17-20. Since the rule had been recognized long before the enactment of the NPA in 1970, its application is necessary if congressional intent is to be the guide.

The weakness of the Free Press's argument that this rule should not be followed is demonstrated by its citation to *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980), as the sole authority for its claim that "[i]n other similar contexts, this Court has refused to construe antitrust exemptions 'narrowly' where the proffered narrow construction would defeat significant competing interests recognized by Congress." Free Press Br. 41. Contrary to the Free Press's representation, this Court did not discuss the antitrust laws in *Dawson*, much less indicate that the patent laws are an antitrust exemption.⁹

In any event, the Attorney General now concedes that, despite *Chevron*, both the courts and the Attorney General must apply the antitrust rule in interpreting the plain language of the NPA, and he appears to agree that the rule would have to be applied even if the statute were ambiguous, although he argues that "somewhat greater caution . . . would be in order." Br. 45 n.30. Therefore, the fact that the majority of the court of appeals relied on *Chevron* to avoid application of the antitrust rule provides an additional reason for reversal of the decision below.

⁹While respondent Attorney General is correct that Attorney General Meese did not explicitly reject the rule (Br. 44), or for that matter even mention it, there is no basis for his statement that "it is undisputed that the Attorney General applied the pertinent canon in construing the Newspaper Preservation Act." *Id.* at 45 n.30.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Decision and Order of the Attorney General should be set aside.

Respectfully submitted,

William B. Schultz
(*Counsel of Record*)
David C. Vladeck
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

September 11, 1989

7
No. 88-1640

Supreme Court, U.S.

FILED

JUN 30 1989

JOSEPH F. SPANIOL, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE
UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**

ROBERT M. WEINBERG
MARTIN S. LEDERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
<i>Addison v. Holly Hill Fruit Products Co.</i> , 322 U.S. 607 (1944)	6
<i>American Power & Light Co. v. SEC</i> , 329 U.S. 90 (1946)	11, 17
<i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965)	14
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	17
<i>Batterton v. Francis</i> , 432 U.S. 416 (1977)	6, 18
<i>Board of Governors, FRS v. Dimension Financial Corp.</i> , 474 U.S. 361 (1986)	13
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	10
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	11
<i>Chevron U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	12
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	9
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	13
<i>East Texas Lines v. Frozen Food Express</i> , 351 U.S. 49 (1956)	6
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (<i>en banc</i>), <i>cert. denied</i> , 426 U.S. 941 (1976)	17
<i>Federal Radio Com. v. Nelson Bros. Bond & Mortgage Co.</i> , 289 U.S. 266 (1933)	6
<i>FTC v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965)	14
<i>Industrial Union Dept., AFL-CIO v. American Petroleum Inst.</i> , 448 U.S. 607 (1980)	9, 11, 13, 17
<i>Karahalios v. National Federation of Federal Employees</i> , — U.S. —, 109 S.Ct. 1282 (1989) ..	7-8
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	9-10
<i>Mississippi Power & Light Co. v. Mississippi ex rel. Moore</i> , — U.S. —, 108 S.Ct. 2428 (1988)	7
<i>Mistretta v. United States</i> , — U.S. —, 109 S.Ct. 647 (1989)	11, 17
<i>Morrison v. Olson</i> , — U.S. —, 108 S.Ct. 2597 (1988)	11

TABLE OF AUTHORITIES—Continued

	Page
<i>National Cable Television Ass'n, Inc. v. United States</i> , 415 U.S. 336 (1974)	9
<i>NLRB v. Brown</i> , 380 U.S. 278 (1965)	14
<i>Northwest Airlines, Inc. v. Transport Workers</i> , 451 U.S. 77 (1981)	10
<i>Packard Co. v. Labor Board</i> , 330 U.S. 485 (1947) ..	13
<i>Public Citizen v. Department of Justice</i> , — U.S. —, 57 U.S.L.W. 4793 (June 21, 1989)	11
<i>Schechter Corp. v. United States</i> , 295 U.S. 495 (1935)	9
<i>Schweiker v. Gray Panthers</i> , 453 U.S. 34 (1981) ..	17, 18
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947)	14
<i>Social Security Board v. Nierotko</i> , 327 U.S. 358 (1946)	6
<i>Stark v. Wickard</i> , 321 U.S. 288 (1944)	4
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	8, 10
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	16
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	17
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	9, 10
UNITED STATES CONSTITUTION	
Article II	9
STATUTES AND REGULATIONS	
Administrative Procedure Act, 5 U.S.C. § 706	16
Newspaper Preservation Act, 15 U.S.C. §§ 1801, <i>et seq.</i>	2, 4
15 U.S.C. § 1802 (5)	<i>passim</i>
15 U.S.C. § 1803 (b)	4
Social Security Act, 42 U.S.C. §§ 301, <i>et seq.</i>	17, 18
42 U.S.C. § 607 (a)	18
42 U.S.C. § 1396 (a) (1) (B)	18
MISCELLANEOUS	
The Federalist, No. 47 (J. Cooke ed. 1961)	10
The Federalist, No. 51 (J. Cooke ed. 1961)	10

TABLE OF AUTHORITIES—Continued

	Page
Fallon, <i>Of Legislative Courts, Administrative Agencies, and Article III</i> , 101 Harv. L. Rev. 973 (1988)	6, 14
Farina, <i>Statutory Interpretation and the Balance of Power in the Administrative State</i> , 89 Colum. L. Rev. 452 (1989)	16, 17
Judicial Review of Administrative Action in a Conservative Era, 39 Admin. L. Rev. 353 (1987) (text of panel discussion held on Oct. 10, 1986) ..	6-7
Monaghan, <i>Marbury and the Administrative State</i> , 83 Colum. L. Rev. 1 (1983)	14-15
Note, <i>Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC</i> , 87 Colum. L. Rev. 986 (1987)	15, 16
Sunstein, <i>Constitutionalism After the New Deal</i> , 101 Harv. L. Rev. 421 (1987)	15, 17
Sunstein, <i>Factions, Self-Interest, and the APA: Four Lessons Since 1946</i> , 72 U. Va. L. Rev. 271 (1986)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

 No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE
 UNITED STATES, *et al.*,
Respondents.

 On Petition for a Writ of Certiorari to the
 United States Court of Appeals for the
 District of Columbia Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR
 AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
 AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

This brief *amicus curiae* is filed with the consent of
 the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 90 national and international unions with a total membership of approximately 13,500,000 working men and women.

The local unions directly affected by this case—locals that are affiliates of member unions of the AFL-CIO—urged the Attorney General to approve the joint operating arrangement at issue here. Nothing we do in this brief is intended to be in conflict with or to put into question the positions taken by these local unions. This brief is not intended to urge a contrary outcome.

The petition in this case presents two questions for review. The first implicates the general question of the judicial deference due to agency decisions respecting the limits of the agency's statutory authority. That question may have ramifications far beyond the four corners of this case. The AFL-CIO, which has a significant interest in the principles governing judicial review of agency determinations, submits this brief solely to address this first issue.

The second issue presented is limited to interpretation of the Newspaper Preservation Act. On that issue, this brief takes no position.

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not submit this brief to urge a particular outcome in this case.¹ Rather, we address solely an issue that is implicated at the threshold of analysis of the first question presented by petitioners: whether any deference should be given to the Attorney General's interpretation of the statutory language here at issue.

The Newspaper Preservation Act does *not* grant the Attorney General unfettered discretion to approve any joint operating arrangement between newspapers that he regards as sound in his own conception of the public

¹ The local unions directly affected by this case—locals that are affiliates of member unions of the AFL-CIO—urged the Attorney General to approve the joint operating arrangement at issue here. Nothing we do in this brief is intended to be in conflict with or to put into question the positions taken by these local unions.

interest. In the context of the Act, the function of the statutory phrase "in probable danger of financial failure" is to delimit the scope of the Attorney General's authority to approve joint operating arrangements between newspapers. The Act does not in express terms delegate to the Attorney General the task of resolving the meaning of these statutory words. The threshold question here, then, is whether it should be *inferred* that Congress intended such a delegation. Only if such an inference is properly drawn would it be appropriate for a court to defer to the construction given by the Attorney General to the statutory language that serves as a limit on his authority.

It is our submission that this inference may not properly be based solely on the fact that Congress has made a delegation of substantive authority to an agency; a delegation of substantive authority to an agency does not carry with it an inference that Congress also intended that the agency be delegated the authority to determine the limits of its own authority.

To the contrary, as we develop in some detail, the basic principles and traditions of our system point to the opposite inference. The line between what has been delegated to an agency and what has not been delegated is of critical importance to the rule of law. It marks the difference between faithful execution of a statute by an agency of the Executive and unauthorized arrogation of power by that agency. It has not been the practice of Congress to grant agencies of the Executive Branch the task of resolving the limits of their own authority. Indeed, as our constitutional scheme envisions, Congress consistently has relied upon the courts as guardians against unauthorized claims of power by the Executive Branch. Where the limits of a statutory delegation to an agency are at issue, there is no alternative, consistent with the premises of our tri-partite system of government, to *de novo* resolution by courts of the proper scope of the legislative delegation to an Executive agency.

ARGUMENT

1. On its face, the Newspaper Preservation Act, 15 U.S.C. §§ 1801, *et seq.*, delegates a limited authority to the Attorney General to reconcile competing interests: on the one hand, the interest in economic competition furthered by the antitrust laws, and on the other hand, the interest in preservation of a diversity of news sources and editorial views. This grant of authority is in the form of a power given to the Attorney General to exempt certain joint operating arrangements between competing newspapers from the proscriptions of the antitrust laws.

The plain language of the Act most assuredly does *not* grant the Attorney General an unfettered discretion to approve any joint operating arrangement between newspapers that he regards to be sound on his own conception of the public interest. Rather, the Attorney General may *only* grant an antitrust exemption to a joint operating arrangement between newspapers if "the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper" 15 U.S.C. § 1803(b). The Act defines "failing newspaper" as one "in probable danger of financial failure." 15 U.S.C. § 1802(5).

The effect of the statutory phrase "in probable danger of financial failure" is thus to delimit the scope of the Attorney General's authority to approve joint operating arrangements between newspapers: no matter what else is true, the Attorney General can only grant an exemption to a joint operating arrangement if *at most one* of the participating newspapers is *not* "in probable danger of financial failure." "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (footnote omitted).

Accordingly, the meaning of the statutory phrase at issue here presents a classic question of statutory interpretation. Congress expressly stated in positive law the intent to limit the Attorney General's discretion to grant exemptions to a class consisting of less than all newspaper joint operating arrangements. Equally to the point, Congress did *not* state that the Attorney General is delegated the task of resolving the meaning of the statutory words—"in probable danger of financial failure"—that define the limitation on Congress' delegation to the Attorney General. The language is set forth in the Act's "Definitions" provision, and there is nothing in the Act, or in any other statute, expressing a congressional intent to delegate to the Attorney General the task of resolving the meaning of those statutory words.

The threshold question here, then, is whether it should be inferred that Congress intended such a delegation—in effect, a delegation to the Attorney General to determine the limits of his own statutory authority. Only if such an inference is properly drawn would it be appropriate for a court to defer—as the court below did—to the construction given by the Attorney General to the statutory language limiting his authority.

The court below apparently drew such an inference solely on the basis that the scheme Congress crafted to implement the Act relies upon an administrator and on judicial review of the administrator's actions rather than on private causes of action to be adjudicated in the district courts. The inference indulged by the court below necessarily implies that whenever Congress delegates a body of authority to an agency, Congress should be understood, absent an explicit direction to the contrary, to have in addition delegated to that agency the task of determining the limits of the authority granted by Congress to the agency.

It is our submission that a delegation of substantive authority to an agency does not carry with it an inference

that Congress also intended that the agency be delegated the authority to determine the limits of its own authority.

2. In its early administrative law cases this Court had no difficulty with the question posed here. As Justice Frankfurter put the point for the Court in *Addison v. Holly Hill Fruit Products Co.*, 322 U.S. 607, 616 (1944): "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." Again, in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), the Court stated: "An agency may not finally decide the limits of its statutory power. That is a judicial function."²

The rationale of these cases is straightforward and compelling:

[A]n article III court must exercise independent judgment concerning all questions of law that it is called upon to decide. Separation-of-powers values call for this conclusion, and sometimes emphatically so. *Especially when an agency's decision of law defines its own jurisdiction*, a judicial check is necessary to prevent self-aggrandizement, arbitrariness, or pursuit of a political agenda not authorized by law. [Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 973, 983 (1988) (emphasis added; footnote omitted).]

Professor Sunstein has stated this rationale in particularly pithy terms:

This principle is a very familiar one. The idea is that those who are limited in their authority by law should not be the judge of those limits. Administrative agencies are constrained by statute, that is, law, and the mere fact that the statute is ambiguous shouldn't give the agency, of all people, the authority

² See also, e.g., *Batterton v. Francis*, 432 U.S. 416, 424-25 & n.8 (1977); *East Texas Lines v. Frozen Food Exp.*, 351 U.S. 49, 54 (1956); *Federal Radio Com. v. Nelson Bros. B&M Co.*, 289 U.S. 266, 276 (1933).

to decide on the meaning of the limitation. The cute way in which it's sometimes put is that foxes shouldn't guard henhouses. [*Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353, 368 (1987) (remarks of Professor Cass Sunstein at panel discussion, Oct. 10, 1986).]

Recent cases, however, have left the state of the law on this issue less than clear. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, — U.S. —, 108 S. Ct. 2428, 2443-44 (1988) (Scalia, J., concurring) ("rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction"); *id.* at 2446-47 (Brennan, J., dissenting) (courts should not defer to agency interpretation of statute confining agency's own jurisdiction).

3. In his concurring opinion in *Mississippi Power & Light*, 108 S. Ct. at 2444, Justice Scalia stated the argument for inferring presumptively a congressional intent to delegate to an agency the task of determining the limits of the grant of authority to the agency:

Deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction. [Emphasis in original.]

Justice Scalia's recognition that it is Congress' "expect[ations]" that are controlling in this regard is, of course, unimpeachable. Where a statute states a legal rule and does not settle in so many words subsidiary questions concerning the rule's implementation—including the question of whom Congress expected to be responsible for resolving particular subsidiary questions—those subsidiary questions are to be answered on the basis of the ascertainable evidence of Congress' intent. This principle has long been recognized by this Court and has most recently been explicated in the "implied cause of action" cases. As the Court stated earlier this year:

[Whether] a cause of action to enforce a [federal statutory duty] should be implied . . . poses an is-

sue of statutory construction: The "ultimate issue is whether Congress intended to create a private cause of action." *California v. Sierra Club*, 451 U.S. 287, 293 (1981); see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). Unless such "congressional intent can be inferred from the language of the statute, the statutory structure, or from some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174 (1988). [*Karahalios v. National Federation of Federal Employees*, — U.S. —, 109 S. Ct. 1282, 1286 (1989).]

By the same token, the question of the relative roles of the Attorney General and the courts in implementing and interpreting the Newspaper Preservation Act is a question of statutory construction in which the ultimate issue is Congress' intent.

At this early point, however, we must part company with Justice Scalia. With all due respect, it would not be "natural" for Congress to expect that, absent an express delegation, an agency will be responsible for determining the scope of a limitation Congress has placed on the agency's own authority. All the relevant materials cut the other way.

4. a. The starting point is that, at least with regard to purely domestic economic and social issues, the policies of the United States are arrived at through legislative enactments, not through unilateral determinations made by the Executive Branch. That is the essence of Article I's grant: "All legislative Powers herein granted shall be vested in a Congress of the United States." As this Court has held: "[I]t is . . . emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

Where Congress has entered a field and delegated a portion of the policy-making function to an Executive

Branch agency or officer, the Executive is not thereby empowered to make independent determinations of the law or of the policy of the United States. The laws that the Executive is commanded by Article II to "faithfully execute[]" are the laws enacted by Congress. In *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), the Court succinctly stated the point:

[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

More recently, Justice Rehnquist (as he then was) in an opinion for a unanimous Court added:

The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. [*Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).]

Indeed, Congress as a matter of practice does not—and as a matter of constitutional law may not—grant unlimited policymaking authority to any agency of the Executive Branch. See *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974); *Schechter Corp. v. United States*, 295 U.S. 495, 529-30 (1935). See also *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672-75 (1980) (Rehnquist, J., concurring).

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), we have been equally clear about the federal judicial role in the construction of federal legislative

enactments: "It is emphatically the province and duty of the judicial department to say what the law is." The judicial task in this regard is, in its most basic terms, to ascertain the will of Congress that is manifested in the statutory language at issue in a case.

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. [*TVA v. Hill*, 437 U.S. at 194. See also *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 (1981).]

The foregoing is not a mere miscellany of rules; the truths we have just canvassed are the corollaries of the basic principles of limited powers and of checks and balances that animate the entire constitutional structure. As this Court has stated: "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). In particular, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *Bowsher*, 478 U.S. at 722 (quoting *The Federalist* No. 47 (Madison)).

Additionally, as Madison explained:

[T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. [*The Federalist* No. 51, 349 (J. Cooke ed. 1961).]

See also *Mistretta v. United States* — U.S. —, 109 S.Ct. 647, 659 (1989); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976); *Morrison v. Olson*, — U.S. —, 108 S.Ct. 2597, 2623 (1988) (Scalia, J., dissenting); see also *Public Citizen v. Department of Justice*, — U.S. —, 57 U.S.L.W. 4793, 4801 (June 21, 1989) (Kennedy, J., concurring).

b. It is within this framework for the making, elaborating and administering of federal law that what Justice Scalia terms "the general rationale for deference" to agency determinations must be understood.

The evolution of the modern administrative state has complicated the interaction of the three branches of the federal government, but has not compromised the integrity of the role each branch is to play in the constitutional scheme. The complexity of our present society has made it increasingly impracticable for Congress to enact fully realized statutory solutions to many of the nation's most pressing problems. The need to address a growing number of problems with a combination of technical expertise and the flexibility to meet rapidly changing conditions has pushed Congress to delegate, through duly enacted legislation, a significant degree of the policy-making function to agencies of the Executive Branch. *Mistretta*, 109 S.Ct. at 654. Often, such delegations include authority to "fill in the blanks" of generally stated statutory policies with more specific agency policy determinations. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 675 (Rehnquist J., concurring). See also, e.g., *Mistretta*, 109 S.Ct. at 655 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) ("this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

Where Congress has delegated to an agency this power to make policy, subjected the agency's authority to stated limits and provided for judicial review of agency actions, the question becomes by what standards courts should review the agency's exercise of that delegated power.

This Court has concluded that the first governing rule in this class of cases is that such decisions by agencies, "*within the limits of [Congress'] delegation,*" are in essence policy choices by a politically accountable branch and thus should receive deference from the courts. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (emphasis added). This rule, we agree, constitutes a fair inference as to Congress' intent. The failure of courts to defer to agency policy decisions as to matters that Congress *intended* to delegate to the agency would be totally at odds with the choice that Congress has made and frustrate the achievement of the decision-making scheme Congress so plainly envisaged: *viz.*, that certain decisions be made by decision-makers who act with a background of expertise and, depending on the nature of the agency, at least some degree of political accountability.

This rationale for judicial deference, however, *cannot* be stretched to justify judicial deference on the distinct question of the scope of the delegation made to an agency. At the outset, it is understatement to say that an agency has no claim to judicial deference as to decisions "[outside] the limits of [Congress'] delegation." *Id.* Indeed, an agency has no authority to make such decisions at all. An agency has no more right than a court to make policy decisions with respect to matters not delegated to the agency. The line between what has been delegated and what has not thus becomes of critical importance to the rule of law. It marks the difference between faithful execution of a statute by an agency of the Executive and unauthorized arrogation of power by that agency.

The process of locating that line, moreover, has none of the characteristics of a function that in the normal course is delegated by Congress to Executive agencies. Resolution of the boundaries of a statutory delegation of authority is not interstitial policymaking, nor does it call for the exercise of politically accountable power. Rather, resolution of such a question calls for the detachment from the political process and the background in determining the legislative will that are the hallmarks of the judicial authority. What is required is no more—and no less—than what is at the core of the judicial function: ascertainment of the will of Congress as manifested in particular statutory language.

It is, accordingly, not surprising that this Court has repeatedly found it appropriate to determine, on a *de novo* basis, the meaning of substantive statutory terms that affect the scope of an agency's delegated authority. See, e.g., *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (Federal Reserve Board overstepped its authority when it extended its regulations to "non-bank banks"); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 645 (plurality opinion) (1980) (rejecting Secretary of Labor's interpretation of substantive standards in the Occupational Health and Safety Act, because "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (Court required to decide whether Secretary properly construed his authority); *Packard Co. v. Labor Board*, 330 U.S. 485, 493 (1947) (Court made *de novo* inquiry into meaning of statute, stating "[w]e are not at liberty to be governed by . . . policy considerations in deciding the naked question whether the Board is now . . . acting within the terms of the statute").

Similarly, in this case the operative question is at bottom what Congress intended by the words "in probable danger of financial failure." That is a question of statutory interpretation, not of policy, a question answerable by application of time-honored judicial methods of statutory construction. "[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words [of the statute] set forth a legal standard and they must get their final meaning from judicial construction." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Thus, even where judicial review is "of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in an unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).³

Nor does the fact that the answer to a question of statutory construction may not be easy or obvious change the basic nature of the judicial task. The judicial responsibility to construe statutes is not limited to easy cases. As Professor Monaghan has put it:

I must confess that I have never understood why judicial doubt should produce a conclusion of deference. The argument from the comparative expertise

³ As Justice Jackson noted in *SEC v. Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting):

I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding.

See also Fallon, 101 Harv. L. Rev. at 985-86 & n.377.

of the agency seems to me no stronger here than elsewhere. . . . More importantly, to the extent that the deference suggestion is grounded upon a general no-right-answer epistemology, it encounters fundamental systemic difficulties. Ex ante it may be that no one conclusion as to what a statute means is ineluctable. Nonetheless there is, in our system, no room for the Scottish verdict of "not proved" on questions of law: The presupposition of the entire legal system is that the court must choose and what it chooses is correct. Thus the Court, for example, continuously chooses between plausible statutory interpretations. The cases in which courts defer in the face of uncertainty must be understood as simply delegations to the agency of a norm-elaboration function. [Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 30 n.177 (1983).]⁴

The last point in the quoted passage bears emphasis. When the statutory issue is the interpretation of a statutory limitation on a delegation to an agency, to "defer in the face of uncertainty" is to effect a delegation: a delegation to the agency to decide the limits of its delegated authority.

c. In the light of the principles thus far established, Justice Scalia's hypothesis as to what Congress would "naturally expect" does not withstand scrutiny.

It is not the norm in our system to give an entity of the Executive Branch the power to determine its own authority. The operating premise of our constitutional

⁴ "The principle that deference depends on congressional delegation does not . . . lead inexorably to the conclusion that statutory ambiguity alone establishes such a delegation." Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 Colum. L. Rev. 986, 995 (1987). See also Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("The fact that a statute can be read in different ways does not mean that Congress intended the agency to resolve the question.").

system has always been directly to the contrary. Madison's statement of the theory of checks and balances has been heeded in practice as well as in constitutional adjudication. In the process of delegating a limited authority to an agency to implement and elaborate the law, it is natural for Congress to look to the Judicial Branch, which has no institutional stake in the allocation of powers between the Executive Branch and the Legislative Branch, to police the boundaries of the delegation. In fact, Congress consistently has relied upon the courts as the guardians against unauthorized claims of power by the Executive Branch. That is the very premise of the Administrative Procedure Act:

To the extent necessary to decision and when presented, the reviewing court shall *decide* all relevant questions of law, *interpret* constitutional and *statutory provisions*, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. [5 U.S.C. § 706 (emphasis added).]⁵

Indeed, judicial enforcement of the limits of statutory delegations of authority to agencies is the touchstone of this Court's jurisprudence respecting the constitutional requirements for valid delegations. To be valid at all, delegations by Congress to Executive Branch agencies must be made with sufficient statutory standards for courts to be able to determine whether the agency is

⁵ See also Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 471-75 (1989); Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 U. Va. L. Rev. 271, 289 (1986); Note, *Coring the Seedless Grape*, 87 Colum. L. Rev. at 995. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (Congress' intent in passing the APA was to require reviewing courts to scrutinize agency action more stringently).

acting within the scope of the delegated authority. As Justice Rehnquist stated, in his concurring opinion in *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 686, the nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." See also *Mistretta v. United States*, 109 S.Ct. at 658; *American Power & Light Co. v. SEC*, 329 U.S. 90, 105-06 (1946); *Yakus v. United States*, 321 U.S. 414, 425-426 (1944); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).⁶

Against this background, to infer as a general rule that Congress would "naturally expect" agencies to have the power to determine the limits of their own authority runs against the grain of the premises of our system. The initial conception of our constitutional scheme, and the evolution of that scheme in practice, lead to just the opposite inference: Congress would expect courts not to defer to an agency decision respecting the scope of authority delegated to the agency.⁷

⁶ "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). See also Farina, 89 Colum. L. Rev. at 485-99 (1989) (canvassing the Court's historical rationale for the delegation doctrine, and the Framers' understanding of checks and balances, and concluding that the development of the modern administrative state through Congressional delegation "can be reconciled with separation of powers principles if, but only if, the new concentration of power is offset by correlative checks").

⁷ See Sunstein, 101 Harv. L. Rev. at 467; Farina, 89 Colum. L. Rev. at 468-76.

Where Congress intends the agency to be the primary interpretive body, Congress knows how to make such an intent explicit. For example, because of the "Byzantine construction" of the Social Security Act, 42 U.S.C. § 301 *et seq.*, "Congress conferred on the Secretary [of Health and Human Services] exceptionally

d. If the inference were otherwise, the practical implications for the law-making process would be profound. The reality is that there are limits to the precision that can be achieved through statutory language. If an imprecision in statutory language relating to a grant of authority may be a license to an agency to aggrandize power, Congress would have to consider whether in any given instance this risk of legislating is out of proportion to the gain. At the least, under such a regime, were Congress to undertake to allocate power to an agency sparingly, it would do so with the hazard that its efforts might be frustrated by the very agency Congress was seeking to limit. These are costs that our constitutional system was designed to avoid through the mechanism of *de novo* judicial consideration of Congress' intent as to the limits of agency authority.

5. To this point, for the sake of clear exposition, we have proceeded as if questions of the limits of agency authority and questions of review of agency policy decisions are readily distinguishable. We do not, however, underestimate the difficulty of the judicial role in sepa-

broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981). Thus, in 42 U.S.C. § 607(a), Congress "expressly delegated to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility." *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (emphasis in original). The pertinent part of section 607(a) required a participating state to provide assistance where a needy child "has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of the father." *Id.* at 419 (emphasis added).

See also *Schweiker v. Gray Panthers*, 453 U.S. at 43-44 (Secretary has been delegated "substantive authority" under 42 U.S.C. § 1396a(a)(17)(B), which provides that states must grant Medicare benefits to eligible persons "taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant" (emphasis supplied by the Court)).

rating out these questions. The line between what is a legal question and what is a policy question, what was intended for the courts and what for the agency, will frequently be hazy. And we are quick to acknowledge that it is just as wrong for courts to overplay their hand as to underplay it. The sorting-out process will require in every case a delicate sensitivity to the various aspects of congressional intention that may inhere in a single administrative delegation. But, in the end, where the limits of a statutory delegation to an agency are at issue, there is no alternative, consistent with the premises of our tri-partite system of government, to *de novo* resolution by the courts of the proper scope of the legislative delegation to an Executive Branch agency.

CONCLUSION

For the foregoing reasons, the Court should: (1) ascertain by the normal methods of statutory construction whether Congress intended to delegate to the Attorney General the task of resolving the meaning of the statutory limitation on his jurisdiction; and, if the Court finds Congress did not have that intention, (2) interpret the statutory language at issue in this case—"in probable danger of financial failure"—according to the Court's best judgment of the intent of Congress, using all the materials normally brought to bear by a court on such a question of statutory construction.

Respectfully submitted,

ROBERT M. WEINBERG
MARTIN S. LEDERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

JUN 30 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE
LITTLE ROCK NEWSPAPERS, INC.
IN SUPPORT OF PETITIONERS**

PAUL L. FRIEDMAN
(Counsel of Record)
ANNE D. SMITH
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0013

PHILIP S. ANDERSON
PETER G. KUMPE
WILLIAMS & ANDERSON
111 Center Street, Suite 400
Little Rock, Arkansas 72201
(501) 372-0800

Counsel for
Little Rock Newspapers, Inc.

Dated: June 30, 1989

4082

QUESTIONS PRESENTED

Little Rock Newspapers, Inc. ("LRNI") adopts the petitioners' statement of the questions presented:

1. Does this Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*"), require a reviewing court to defer to an administrative agency's expansive interpretation of an exemption from the antitrust laws where the agency's construction is at odds with the established rule that exemptions from the antitrust laws must be narrowly construed?

2. In determining whether two competitively equal newspapers qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that only requires (a) a showing that both papers have lost money for several years and (b) a statement by representatives of the "non-failing" paper that it will not raise its prices even if the exemption is denied?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. <i>CHEVRON</i> DOES NOT AUTHORIZE DEFER- — ENCE TO THE ATTORNEY GENERAL'S DECISION IN THIS CASE	4
A. The Court of Appeals Misread and Misap- plied <i>Chevron</i> in Disregard of Congress' Clear Intent	4
B. The Language and Structure of the News- paper Preservation Act and Its Legislative History Demonstrate that Congress Intended Narrow Access to Post-Enactment JOAs.....	7
C. The Canon of Statutory Construction That Antitrust Exemptions Are To Be Narrowly Construed Underlines Congressional Intent to Restrict the Availability of Post-Enactment JOAs	11
II. THE PANEL DECISION AFFIRMS AN IN- TERPRETATION OF THE NEWSPAPER PRESERVATION ACT THAT IS INCONSIST- ENT WITH CONGRESSIONAL INTENT AND WRONG AS A MATTER OF STATU- TORY INTERPRETATION AND CONGRES- SIONAL POLICY	13

TABLE OF CONTENTS—Continued

	Page
A. The Panel Failed to Distinguish Between the Separate Standards Established By Congress for Pre-1970 and Post-1970 JOAs	13
B. The Decision Permits Parties to Justify a JOA Through Their Own Predatory Behavior Without Regard to Market Forces	16
C. The Decision Creates a Blueprint for Destruction of Newspaper Competition in Little Rock and Elsewhere	22
CONCLUSION	24
APPENDICES	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Bowen v. American Hosp. Assoc.</i> , 476 U.S. 610 (1986)	12, 13
<i>Bowen v. Georgetown Univ. Hosp.</i> , 109 S. Ct. 468 (1988)	12
<i>Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Auth.</i> , 464 U.S. 89 (1983) ..	7
<i>Cargill, Inc. v. Monfort of Colo., Inc.</i> , 479 U.S. 104 (1986)	20
<i>Chevron, U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984)	passim
<i>Citizens Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	7, 8
<i>Committee for an Indep. P.I. v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983)	3, 5, 10, 12, 16
<i>Community Communications Co. v. Boulder</i> , 455 U.S. 40 (1981)	11
<i>Federal Maritime Comm'n v. Seatrain</i> , 411 U.S. 726 (1973)	11, 12
<i>Group Life & Health Ins. Co. v. Royal Drug Co.</i> , 440 U.S. 205 (1979)	11
<i>Immigration and Naturalization Serv. v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	13
<i>NLRB v. United Food & Commercial Workers Union</i> , 108 S. Ct. 413 (1987)	5
<i>Michigan Citizens for an Indep. Press v. Thornburgh</i> , 868 F.2d 1285 (D.C. Cir. 1989)	passim
<i>Square D Co. v. Niagara Frontier Tariff Bureau</i> , 476 U.S. 409 (1986)	11, 12
<i>United States v. First City Nat'l Bank</i> , 386 U.S. 361 (1966)	10
<i>United States v. Shimer</i> , 367 U.S. 374 (1961)	4
<i>United States v. Third Nat'l Bank</i> , 390 U.S. 171 (1968)	9, 10

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS	Page
Bank Merger Act of 1966, 12 U.S.C. § 1828 (1982)	9, 10
12 U.S.C. § 1828(c)	9
Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1982)	<i>passim</i>
15 U.S.C. § 1802(1)	16
15 U.S.C. § 1802(5)	8
15 U.S.C. § 1803(a)	8, 14
15 U.S.C. § 1803(b)	14
15 U.S.C. § 1803(c)	17
Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1988)	17
49 U.S.C. § 11341	17
MISCELLANEOUS	
Administrative Law Judge Morton Needelman's Recommended Decision, Docket No. 44-03-24-8 (Dec. 29, 1987)	13, 18, 22, 23
Attorney General's Decision and Order, Docket No. 44-03-24-8 (Aug. 8, 1988)	14, 18, 20
R. Bork, <i>The Antitrust Paradox</i> 153 (1978)	19
116 Cong. Rec. (daily ed. July 8, 1970)	8, 9
116 Cong. Rec. (daily ed. Jan. 30, 1970)	9, 11
<i>Editor & Publisher</i> , Aug. 13, 1988, at 15	22
Gannett Co., Inc. 1987 Annual Report (1988)	22
H. Rep. 1193, 91st Cong., 1st Sess. (1970)	8
Report of Assistant Attorney General Douglas H. Ginsburg in the Matter of Application by Detroit Free Press, Inc., <i>et al.</i> , Public File No. 44-03-24-8 (July 23, 1986)	18, 19
S. Rep. 535, 91st Cong., 1st Sess. (1969)	9
K. W. Starr, <i>Judicial Review in the Post-Chevron Era</i> , 3 Yale J. on Reg. 283 (1986)	7
N.Y. Times, Sept. 15, 1988, at D1	24

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

 No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH,
 United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
 for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE
 LITTLE ROCK NEWSPAPERS, INC.
 IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of LRNI with the written consent of all parties. LRNI publishes the *Arkansas Democrat* in Little Rock, Arkansas, one of only 25 cities in the United States where two separately owned daily newspapers compete for news, advertising and circulation. The *Arkansas Gazette*, a newspaper owned by Gannett Co., Inc. ("Gannett"), the same company that owns the *Detroit News*, competes directly with the *Arkansas Democrat*.

As publisher of a paper in a two newspaper market, LRNI has been and will continue to be directly affected by the precedent set by the affirmance of the joint operating agreement between the *Detroit Free Press* and the *Detroit News*. LRNI participated as *amicus curiae* before both the district court and the court of appeals, and LRNI's position was discussed in the opinions of the court of appeals. LRNI described events in the Little Rock newspaper market immediately after the initial approval of the Detroit joint operating agreement ("JOA") that provide a vivid illustration of the impact of the Attorney General's decision on competition in the newspaper industry.

Since acquiring the *Arkansas Gazette*, a previously profitable newspaper, Gannett has operated the paper at an intentional and substantial loss for the apparent purpose of forcing the *Arkansas Democrat* to incur more substantial losses. As was done in Detroit, Gannett increased discounting of circulation prices to unprecedented levels, increased promotional expenditures to record highs, and reduced advertising rates after the *Democrat* implemented rate increases. Six days after approval of the Detroit JOA by the Attorney General, Gannett reduced home delivery subscription rates to all subscribers of the *Gazette* by 57.5 percent. This reduction was made at a time when the *Gazette's* circulation was already increasing.

If the *Democrat* is forced to match losses with a company generating over \$590 million annually in pre-tax profits, the alternative it ultimately may face is the prospect of elimination from the market unless it seeks a JOA. So long as Gannett can pursue such a strategy in Little Rock and elsewhere, using Detroit as a precedent, Gannett is free to eliminate economic competition in the remaining 25 competitive newspaper markets.

STATEMENT OF THE CASE

LRNI adopts petitioners' statement of the case.

SUMMARY OF ARGUMENT

1. The panel majority failed to give voice to the congressional intent evident from the language and structure of the Newspaper Preservation Act, its legislative history, and the applicable canon of statutory construction. As a result it misapplied this Court's decision in *Chevron* to require deference to an agency decision that is clearly inconsistent with Congressional intent. In this case Congress already had struck the balance between compelling policies in the Act to favor narrow access to a JOA and the antitrust exemption of the Act. There was no intention in the Act either to abrogate the established canon of statutory construction that antitrust exemptions are to be narrowly construed or to defer to the Attorney General's decision where he disregards both that canon and congressional intent.

2. In affirming the Attorney General's construction of the statutory requisite of "probable danger of financial failure" to require only a showing that (a) losses exist and (b) those losses cannot be unilaterally reversed, the majority affirmed an interpretation of the Act that failed to draw any distinction between the two separate definitions of failing newspaper Congress purposely adopted under the Act. It also misapplied the application of the test for determining "probable danger of financial failure" utilized by the Ninth Circuit in *Committee for an Indep. P.I. v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983) ("*Hearst*"). As a result, the majority wrongly concluded that newspapers themselves can create the conditions necessary to obtain a JOA through their own competitive behavior without regard to market forces.

3. In affirming the Attorney General's decision to approve a JOA between two papers, each of which incurred

losses as a part of deliberate competitive strategies and which, despite those strategies, remain virtual competitive equals, the majority gave judicial approval to questionable and probably destructive competitive behavior and created a blueprint for the similar destruction of competition in other two newspaper cities that even now is being used in Little Rock.

ARGUMENT

I. *CHEVRON* DOES NOT AUTHORIZE DEFERENCE TO THE ATTORNEY GENERAL'S DECISION IN THIS CASE

A. The Court of Appeals Misread And Misapplied *Chevron* In Disregard Of Congress' Clear Intent

The analysis required by *Chevron* for court review of agency decisions is well known. The reviewing court must determine first "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In making the determination, the reviewing court necessarily looks at all indicators of congressional intent by "employing traditional tools of statutory construction." *Id.* at 843, n.9. If after such examination the court determines there is not evidenced an "unambiguously expressed" intent, it then must turn to a second inquiry, *i.e.*, to determine if the agency's determination "is based on a permissible construction of the statute." *Id.* at 843. If the agency decision is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," the court "should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961).

The role of legislative intent is important under *Chevron*. This is so regardless of whether a specific intent is discerned by the reviewing court or, absent such

specificity, the reasonableness of an agency decision is being measured. This Court in *Chevron* itself, having determined that a specific congressional intent was not evident, used the evidence of intent present in the legislative history to measure the reasonableness of EPA's determination against "the legislative history as a whole" to ascertain intent even where the precise issue was not addressed in the legislative history. 467 U.S. at 862-863. See also *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987).

The panel majority, "unable to discern a specific congressional intent governing this case," applied *Chevron* to compel deference to the Attorney General's interpretation of "probable danger of financial failure" as a permissible interpretation under the Act. *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1291 (D.C. Cir. 1989) ("*Michigan Citizens*"). The majority found the Attorney General's interpretation reasonable because it was based on his application of the test developed by the Ninth Circuit in *Hearst* and on his prediction of the future behavior of the competing Detroit newspapers, namely, that the *News* would continue to price below cost and, in doing so, would outlast the *Free Press*, and that the threat of management to close the *Free Press* "cannot be wholly disregarded." *Id.* at 1290, 1291.

According to the majority, the fact that the Attorney General's interpretation did not employ the canon of statutory construction that exemptions to the antitrust laws must be construed narrowly was irrelevant because *Chevron* prohibits such application:

But *Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded

the interpretation a few degrees in one direction or another. (Emphasis in original.)

Michigan Citizens, 868 F.2d at 1292.

The panel majority was wrong because Congress' intent in passing the Newspaper Preservation Act was clear. Using the "traditional tools of statutory construction" as in *Chevron*, the court of appeals had to conclude that Congress had a clear intent (1) as to the meaning and interpretation of the statutory term "probable danger of financial failure" in the definition of "failing newspaper," (2) that the meaning of "probable danger" is ultimately a matter for judicial interpretation, and (3) that the antitrust exemption under the Act was to be available to post-enactment JOAs only upon satisfaction of a tougher, more stringent test than applies to pre-enactment JOAs, in order to prevent premature resort to a JOA. Congress already had struck the balance between the competing policies of the Act to favor narrow access to a JOA and the antitrust exemption in the Act. In view of this strong manifestation of Congressional intent, the panel majority wrongly deferred to the Attorney General's minimalist determination that the *Free Press* is a "failing newspaper" only because it is losing money and could not unilaterally restore itself to a profitable position.

Unlike the situation in *Chevron*, this case does not involve a technical and complex statutory regime. Unlike the EPA Administrator in *Chevron*, the decision-maker here, the Attorney General, is not an expert in the antitrust field and in fact reached conclusions contrary to those in his Department who are experts. Unlike the statute in *Chevron*, in the Newspaper Preservation Act Congress effectively made the central policy choice rather than commit it to agency discretion. The "detailed and reasoned" consideration in this case, *Chevron*, 467 U.S. at 865, was performed by the Ad-

ministrative Law Judge whose legal conclusions were reversed by the Attorney General. Moreover, this case involves both a far less complicated statute and one that grants an antitrust exemption, an area traditionally left to the close review of the judiciary. For all these reasons, the deference accorded to the Attorney General's decision under the majority's reading of *Chevron* was wrong and should be reversed.¹

B. The Language and Structure of the Newspaper Preservation Act and Its Legislative History Demonstrate that Congress Intended Narrow Access to Post-Enactment JOAs

The Newspaper Preservation Act was Congress' reaction to this Court's decision in *Citizen's Publishing Co. v. United States*, 394 U.S. 131 (1969) ("*Citizen's Publishing*"). In that case, the Court held that the 25-year old joint operating agreement between two Tucson, Arizona newspapers violated both the Clayton and Sherman Antitrust Acts and that neither paper qualified as a "failing company"—the only defense then available to an otherwise illegal combination. At the time the Tucson papers entered into their JOA in 1940 one paper was losing money. Yet, this Court held that it was not a "failing company" because there had been no showing that it was on the brink of collapse, with dim or non-

¹ At a minimum these factors would support the need for "a more searching review of the reasonableness" of the Attorney General's interpretation, K. W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 299 (1986). In addition to the ample evidence in this case that Congress specifically intended that the availability of post-enactment JOAs should be narrowly limited, however, these factors serve to emphasize that deference to the agency decision here is inappropriate. Cf. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) ("reviewing courts . . . must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'" (citation omitted)).

existent prospects for reorganization and no prospect of a buyer. *Citizen's Publishing*, 394 U.S. at 136-139.

Concerned that 22 other JOAs in other cities would similarly be attacked years after they had been entered into, Congress fashioned a statute in response to *Citizen's Publishing* that not only articulated two different definitions of a failing newspaper, one for JOAs entered into before the Act's effective date (July 24, 1970) and another for JOAs sought after that date, but also required each post-enactment JOA to obtain the Attorney General's approval.

Congress established a lenient test for the 22 existing JOAs to qualify for the antitrust exemption under the Act. This was a recognition of the "prolonged period in which the participants had engaged in these joint newspaper operating arrangements in the belief that such activities were lawful, and in view of the prolonged period in which the Department of Justice permitted the arrangements to operate without challenge. . . ." H. Rep. 1193, 91st Cong., 1st Sess. 9 (1970).² Thus, the Act provides that the existing pre-1970 JOAs are not unlawful if at the time they were entered into not more than one party was a paper "likely to remain or become financially sound." 15 U.S.C. 1803(a).

In contrast, to qualify for a JOA after July 24, 1970, at least one paper had to be "in probable danger of financial failure." 15 U.S.C. § 1802(5). The "probable

² The legislative history indicates considerable concern over the future of existing JOA's. Twenty-one members discussed the need for leniency for existing JOAs during the debates. See, e.g., 116 Cong. Rec. H6454 (daily ed. July 8, 1970) (statement of Rep. McCulloch) ("In the capital city of Ohio, Columbus, two newspapers, the Dispatch and the Citizens Journal, executed a joint operating agreement in 1959 . . . However, the legality and continued existence of these arrangements all over the country have been threatened by the decision in *Citizens Publishing Co. against United States* . . .").

danger" test was intended to be "far more stringent", 116 Cong. Rec. H6452 (daily ed. July 8, 1970) (statement of Rep. Kastenmeier) and "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure." *Id.* at H6454 (statement of Rep. McCulloch); see *id.* at H6460 (statement of Rep. Railsback).

In addition to this more stringent test, the Act's required approval of the Attorney General for post-enactment JOAs was intended to "act as a brake upon other newspapers which otherwise might prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition." 116 Cong. Rec. S938 (daily ed. Jan. 30, 1970) (statement of Sen. Hruska). This procedure insured that the antitrust exemption would not be easily obtained: "[T]he prospective availability of the exemption has been sharply restricted by requiring the consent of the Attorney General for any future joint arrangement and by circumscribing his power to consent through the use of a strict definition of 'failing newspaper.'" 116 Cong. Rec. H6460 (daily ed. July 8, 1970) (statement of Rep. Railsback).

Congress viewed the "probable danger" test as a clear standard derived from the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), and interpreted by this Court in *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968) ("*Third Nat'l*"). See S. Rep. 535, 91st Cong., 1st Sess. 2 (1969). As Congressman Kastenmeier stated: "The term 'in probable danger of financial failure' is one that has a legislative history. It comes out of the Bank Merger Act. It is understood by the courts in the field, and happens to be a term that is well-known." 116 Cong. Rec. H6452 (daily ed. July 8, 1970) (statement of Rep. Kastenmeier).

The Bank Merger Act of 1966 conferred an antitrust exemption for bank mergers that would otherwise violate the Clayton Act standard that it contained. Such an exemption had to be authorized in each case by the Comptroller of the Currency upon the appropriate statutory finding. In reviewing such a finding in *Third Nat'l*, this Court required that "before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means." *Third Nat'l*, 390 U.S. at 190. Under *Third Nat'l* applicants must "reliably establish the unavailability of alternative solutions" before the antitrust exemption is justified. *Id.*³

Under the Bank Merger Act the courts have broad responsibility for interpreting and reviewing agency interpretations: "[I]t is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal." *United States v. First City Nat'l Bank*, 386 U.S. 361, 369 (1967). "The courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 369. This Court's pronouncement in this regard in the bank merger context is fully consistent with the traditional role given to the judiciary in enforcing antitrust policy. From administering the "rule of reason" to determining effects on competition, the courts' "appraisal of competitive factors is grist for the antitrust mill." *United States v. First City Nat'l Bank*, 386 U.S. at 369.

The focus of the Newspaper Preservation Act's dual definition structure, therefore, was to protect the 22 existing JOAs that Congress perceived to be at risk but to raise barriers to future JOAs by stiffening the qualifica-

³ This Court in *Third Nat'l* also stated that banks cannot qualify for an antitrust exemption simply through financial mismanagement, 390 U.S. at 189, 192, a conclusion adopted by the Ninth Circuit in *Hearst*. 704 F.2d at 478.

tion requirements, thus ensuring that the exemption to the antitrust laws carved out by the Act would be limited in its availability and its application. Moreover, by selecting the "probable danger" test with its history of judicial interpretation, Congress not only intended a similarly strict test under the Act, but also expected the courts to play their traditional role in its interpretation and not to give deference to the Attorney General.

C. The Canon of Statutory Construction That Antitrust Exemptions Are to be Narrowly Construed Underlines Congressional Intent to Restrict the Availability of Post-Enactment JOAs

Congress provided in the Newspaper Preservation Act "only a limited exemption from the antitrust laws," 116 Cong. Rec. S938 (daily ed. Jan. 30, 1970) (statement of Sen. Hruska), demonstrating yet again what this Court has termed the "longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Community Communications Co. v. Boulder*, 455 U.S. 40, 56 (1981). Consistent with the importance given to the antitrust laws by Congress and the courts is the established canon of statutory construction that exemptions to the antitrust laws should be construed narrowly. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Federal Maritime Comm'n v. Seatrain*, 411 U.S. 726, 733 (1973). The importance of this canon in particular has been reaffirmed and emphasized by this Court subsequent to its decision in *Chevron*. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986).

The deferential review accorded to the Attorney General's decision by the panel majority specifically declined to consider this critical canon of statutory construction.⁴

⁴ Respondents have argued that the statement of the majority that *Chevron* "precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency inter-

In holding that the canon cannot serve as a vehicle for overruling an otherwise reasonable agency decision, the court relegated the canon to the role of an alternative policy choice the Attorney General could have made but was not required to make in balancing the competing imperatives of the Act. *Michigan Citizens*, 868 F.2d at 1293. This approach is inconsistent with the important role assigned to the use of canons in *Chevron* itself. 467 U.S. at 843 n.9. If a canon of statutory construction is a tool to determine congressional intent, it is far more than a mere policy choice an agency can choose to ignore at will.

The majority's holding that this canon of statutory construction is inapplicable when interpreting the Act conflicts with previous pre- and post-*Chevron* decisions of this Court. See *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. at 421 ("exemptions from the antitrust laws are to be strictly construed and strongly disfavored"); *Federal Maritime Comm'n v. Seatrain*, 411 U.S. at 733 (a "broad reading of [the Shipping Act of 1916] would conflict with our frequently expressed view that exemptions from the antitrust laws are strictly construed."). It also conflicts with post-*Chevron* decisions that have relied upon other important canons of statutory construction in reaching their results. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988) (statutes to be construed as not conferring implied authority to issue retroactive regulations); *Bowen v. Amer-*

pretations of ambiguous statutes," *Michigan Citizens*, 868 F.2d at 1292 (emphasis in original), is *dictum* and that the Attorney General in fact implicitly considered the canon by applying the test evolved by the Ninth Circuit in the *Hearst* case. Brief of Respondent Detroit Free Press in Opposition to Petition for Certiorari at 16. The court of appeals, however, held that under a *Chevron* deference analysis of the Attorney General's decision the canon is insignificant. Moreover, the Attorney General, unlike the court in *Hearst*, never explicitly discussed the canon or how it applied to his decision.

ican Hosp. Assoc., 476 U.S. 610, 644 n.33 (1986) (statutes in derogation of sovereignty to be strictly construed); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (construing any lingering ambiguities in deportation statutes in favor of alien).

Nothing in *Chevron* or in this Court's decisions since *Chevron* suggest that a reviewing court is bound by *Chevron* to ignore a guide "of such 'fundamental importance' . . . to antitrust law administration." *Michigan Citizens*, 868 F.2d at 1300 (Ruth B. Ginsburg, J., dissenting).

II. THE PANEL DECISION AFFIRMS AN INTERPRETATION OF THE NEWSPAPER PRESERVATION ACT THAT IS INCONSISTENT WITH CONGRESSIONAL INTENT AND WRONG AS A MATTER OF STATUTORY INTERPRETATION AND CONGRESSIONAL POLICY

A. The Panel Failed to Distinguish Between the Separate Standards for Pre-1970 and Post-1970 JOAs

The panel majority affirmed as reasonable the Attorney General's conclusion that the *Detroit Free Press* had met the standard of "failing newspaper" by demonstrating that it had suffered operating losses over a period of years and that those losses could not be reversed by the unilateral action of the *Free Press*. *Michigan Citizens*, 868 F.2d at 1290. Thus, although the Administrative Law Judge and the Antitrust Division had advised against approval of the JOA, Administrative Law Judge Morton Needleman's Recommended Decision, Docket No. 44-03-24-8 (Dec. 29, 1987) ("ALJ") at 43, the Attorney General concluded that the *Detroit Free Press*, with almost half the daily circulation in the Detroit market, was "in probable danger of financial failure" and qualified for a JOA under the Act. As the majority opinion acknowledged, a JOA has never before been approved where the so-called "failing newspaper" claimed such a sizable

segment of the market. *Michigan Citizens*, 868 F.2d at 1292.

The Attorney General conceded that the *Free Press* is clearly not in a "downward spiral" that is traditionally found in JOAs, where loss of circulation leads to loss of advertising which in turn leads to more circulation losses. Attorney General's Decision and Order, Docket No. 44-03-24-8 (Aug. 8, 1988) ("Attorney General's Decision") at 8. As a result, the Attorney General's finding of "probable danger of financial failure" was indistinguishable from a finding under the pre-1970 standard of "not likely to become or remain financially sound." Thus, contrary to the clearly distinct categories established by Congress in the Newspaper Preservation Act, the Attorney General in this case effectively has equated the test of a "failing newspaper" for JOAs entered into after 1970 with the test for pre-1970 JOAs.

The Attorney General's failure to distinguish his definition of "failing newspaper" under Section 1803(b) of the Act from the lesser standard in Section 1803(a) troubled the dissenting member of the panel:

... the Decision affords no assurance that the Attorney General has found a "middle ground" firmer than the pliant "not likely to . . . become financially sound" ground that Congress thought inadequate for new agreements. The Decision never suggests any separate content for the "probable danger" standard to distinguish it from the more accommodating one.

Michigan Citizens, 868 F.2d at 1299. (Ruth B. Ginsburg, J., dissenting).

The majority dismissed this concern as an attempt to require the Attorney General to draw "the exact boundaries between the two sections" and therefore "to offer dicta that we normally eschew." *Michigan Citizens*, 868 F.2d at 1294. Far from seeking to require the Attorney General to offer dicta, however, Judge Ginsburg properly identified the need to distinguish between the two tests in order to give effect to the congressional intent

and purpose behind the distinction. Congress drew the boundaries and the Attorney General was required only to apply them. The Attorney General, however, with the concurrence of the panel majority, effectively collapsed the two standards and thus failed to give meaning to a critical distinction central to the congressional intent evident in the scheme of the Act.

The Attorney General also concluded, and the panel majority agreed, that the "probable danger of financial failure" test could be met if the *Free Press*' losses were caused by the willingness of the *News* to continue to incur losses by refusing to raise prices, in order to drive the *Free Press* from the market or jointly to persuade the Attorney General to grant a JOA. The panel majority found this reasoning consistent with the Act: "[A] newspaper owner who holds an advantage in a two newspaper city might be irrational if he did not attempt to drive his competitor out of business. Otherwise, he might wake up one day to realize that he had lost the superior position and was already himself in the downward spiral." *Michigan Citizens*, 868 F.2d at 1302 (emphasis in original).

Under this interpretation of the Act, the *News*' losses, although deliberately sustained, are "irreversible" because the *News* cannot relent in its below-cost pricing strategy without the risk of losing its edge in the circulation and advertising markets. Although acknowledged as the "leading" paper in Detroit (with leads in "most of the circulation, revenue, and advertising lineage figures", *Michigan Citizens*, 868 F.2d at 1290), the *News* nonetheless qualifies as a "failing newspaper" under the Attorney General's view because it is suffering losses and cannot unilaterally reverse those losses, except at the risk of possibly losing its slight lead in the market. This is not what Congress intended for post-1970 JOAs.

The relationship between a "downward spiral" and the statutory test of "probable danger of financial loss" was

recognized by the Ninth Circuit in *Hearst* but wholly ignored by the panel majority here. In *Hearst* the losses suffered were evidence of a paper in a downward spiral and thus legitimately "irreversible." In this case the losses are the result of competitive strategic choices that the Administrative Law Judge and the Assistant Attorney General for Antitrust perceived to be reversible if the JOA were denied. As the dissent stated:

Without the lure of a JOA, however, what reason is there to believe that the losses here "likely cannot be reversed"? Absent the Attorney General's promise of that large pot of gold, would the parties not have, as the Antitrust Division suggested, an effective "incentive to adopt strategies directed toward achieving profitability in a competitive marketplace"?

Michigan Citizens, 868 F.2d at 1299 (Ruth B. Ginsburg, J., dissenting) (citations omitted) (emphasis in original). Permitting a JOA on the basis affirmed below undermines the statutory scheme and should not be permitted.⁵

B. The Decision Permits Parties to Justify a JOA Through Their Own Predatory Behavior Without Regard to Market Forces

For JOAs that pass statutory muster, the Act provides immunity from prosecution under the antitrust laws for such practices as market sharing, price fixing and monopolization. 15 U.S.C. § 1802(1). It is a more limited

⁵ The statements of Knight-Ridder executives that the paper will close if the JOA is not granted, *Michigan Citizens*, 868 F.2d at 1291, repeated in the *Free Press* pleadings before the court of appeals and in this Court, see, e.g., Brief in Opposition to Petition for Certiorari of Detroit Free Press, Incorporated at 22, appear at odds with a current advertising campaign in the *Free Press*. See Appendix A, an advertisement that has run in the *Free Press* on several occasions, most recently on June 21, 1988. The advertisement states: "The trend is clear. The *Free Press* is the newspaper gaining momentum in metro Detroit. Fact is, *Free Press* circulation outgained the News in the metro area—two-to-one daily and by an even greater margin on Sunday during the past six months. . . . (citations omitted)".

exemption from prosecution than is available under other antitrust exemption statutes,⁶ and specifically does not exempt the parties to the agreement from liability for "any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." 15 U.S.C. § 1803(c).

The JOA approved by the Attorney General and affirmed by the panel majority is inconsistent with this congressional purpose because it was based on a competitive situation created entirely by the interactive intentional conduct of the parties and not by market conditions. The Attorney General's definition of failing newspaper affirmed by the panel majority "allows parties situated as Gannett and Knight-Ridder are artificially to generate and maintain the conditions that will yield them a passing JOA." 868 F.2d at 1299 (Ruth B. Ginsburg, J., dissenting).⁷

⁶ Cf., e.g., 49 U.S.C. § 11341 (exemption from the antitrust laws as necessary to carry out transactions authorized by Interstate Commerce Commission).

⁷ In many cities where papers were granted JOAs either before or after passage of the Newspaper Preservation Act, one newspaper succeeded where another failed over a protracted period of time. The failing newspaper was frequently marked by declining readership and circulation, resulting in declines in market penetration and advertising.

The cause of these declines often included an inferior news and editorial product, less efficient delivery service, more costly means of production or less adept management. In some cases, a newspaper's decline could be attributed to less interest by their stockholders in newspaper publishing, or difficulty in transition from one generation to another in the family business of the newspaper. It is unlikely, therefore, that Congress had foreseen a situation where one newspaper attempted to dominate or monopolize the market through intentional below-cost pricing. Below-cost pricing has not been a major concern in JOAs considered since the passage of the Newspaper Preservation Act prior to the Detroit case.

The Attorney General himself explained that the losses suffered by the two Detroit papers are not attributable to market forces:

[The Free Press] plainly does not face external market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend almost certain failure. Nor . . . do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial “downward spiral” that is fatal to survival.

Attorney General Decision at 8.

The Administrative Law Judge concluded that the operating losses incurred by both newspapers were “attributable to the same causes—an attempt . . . by a deep pocketed chain to achieve market domination and future profitability at the cost of current profits. . . .” ALJ at 19-20.⁸ This behavior raises significant questions whether a JOA should be available under such circumstances. As then Assistant Attorney General Douglas Ginsburg stated in concluding that the parties had not yet justified a JOA:

The losses of the Free Press were sustained in an effort to achieve “dominance.” When a newspaper owner consciously and deliberately decides to sacrifice short-term profits in a quest for greater long-term profits, indeed monopoly profits, should a JOA be

⁸ The struggle has led, as the panel majority stated, to “large operational losses by both papers.” *Michigan Citizens*, 868 F.2d at 1289. Those losses have deepened considerably since Gannett bought the *Detroit News* in 1986. In 1985, the year before Gannett bought the *News*, the *News* made a profit of \$667,000 while the *Free Press* lost \$8.4 million. In 1986, under Gannett ownership, the *News* lost \$13 million and the *Free Press* lost \$17 million. ALJ at 63, 71; Report of Assistant Attorney General Douglas H. Ginsburg in the Matter of Application by Detroit Free Press, Inc., et al., Public File No. 44-03-24-8 (July 23, 1986) (“AAG Report”) at 38.

available as a “second-best” alternative? This issue is especially important here because the Free Press has not lost the battle; rather, it and the News, according to the statement of the chairman of the parent companies, have “fought to a virtual draw.”

AAG Report at 6-7.

Granting a JOA to “this sort of self-serving, competition-quieting arrangement,” *Michigan Citizens*, 868 F.2d 1299 (Ruth B. Ginsburg, J., dissenting), rewards potentially predatory conduct and removes the natural incentive a competing newspaper has to engage in market behavior designed to maximize short-term profit. Normally the profit motive together with the need to survive insures that a business will conduct itself to assure maximum short-term profits. By guaranteeing survival, a share of supracompetitive profits and probable monopoly to surviving newspapers that qualify for a JOA, the Act weakens one of these normal marketplace incentives.⁹ If

⁹ Robert Bork in his seminal work, *The Antitrust Paradox*, dismissed the consumer threat of predatory pricing, concluding that such conduct was irrational in most cases because the strategy would not succeed. A linchpin of his logic is that such conduct would produce a “fight-to-the-death”:

First, the modern law of horizontal mergers makes it all but impossible for the predator to bring the war to an end by purchasing his victim. . . . Even the much less stringent merger law advocated elsewhere in this book would preclude the attainment of the monopoly necessary to make predation profitable. This means that the price war must be protracted until the victim’s facilities are entirely driven from the industry, without possibility of return, and there will always be the danger, until the victim’s organization and facilities are irretrievably scattered, that an outside purchaser may appear; then the costly war will have been for nothing.”

R. Bork, *The Antitrust Paradox* 153 (1978). The panel majority fails to recognize the significance of predatory pricing disincentives on market-place behavior. After the court’s holding, predation becomes not irrational, but supremely rational. Without thoughtfully drawn disincentives, predation in a context like Detroit is inevitable.

the standard for a failing newspaper under the Act is not brightly drawn and carefully enforced, as Congress intended, the Act may encourage conduct that is destructive of competition by completely removing any motive for short-term profit maximization in favor of long-term rewards.¹⁰

The standard set by the Attorney General and affirmed by the panel majority gives minimal consideration to the concern that parties might engage in such short term destructive behavior. The Attorney General blamed this result on Congress: "Congress opened the door to just this sort of response with the passage of the Newspaper Preservation Act." Attorney General's Decision at 12. The majority acknowledged that the "real difficulty with this case" is the fear that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing," *Michigan Citizens*, 868 F.2d at 1296, but attributed this difficulty to the statute's "dual motive" of preserving editorial voices balanced with the "pro consumer direction of the antitrust laws." *Michigan Citizens*, 868 F.2d at 1293, 1297.¹¹ The problem is that both the Attorney General and the court in their analyses ignored the purpose, language and intent of the Act as expressed by Congress.

Congress recognized that the newspaper business was like many other businesses and that, over time, some

¹⁰ Chief Judge Wald, dissenting from the denial of rehearing *en banc*, questioned the wisdom of condoning such methods of competition: "Nor do I see how a court can ignore the fact that the economic behavior on which the Attorney General's grant of immunity rests comes perilously close if it does not actually constitute 'a practice inimical to the purpose of the antitrust laws,'" 868 F.2d at 1305 (Wald, J., Edwards, J. and Mikva, J., dissenting), citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986).

¹¹ According to the panel majority, "the Attorney General implicitly recognized that it would be impossible completely to preclude competing newspapers from factoring into their business strategy the prospect of a JOA." (emphasis added) *Michigan Citizens*, 868 F.2d at 1297.

firms would succeed while others would fail for a variety of reasons: less adept management, poorer marketing skills, an inferior quality product (news), worse distribution (home delivery service) and poor financial management. The strength of America's economic system depends on giving firms the freedom to fail, affording survival to those that offer the best product and service at the best price. In deciding to provide some level of protection to failing newspapers from the laws of economics, Congress realized, however, that communities lost more than economic competition with the demise of a daily newspaper. In most cities, the loss of economic competition was coupled with the loss of journalistic competition. In passing the Newspaper Preservation Act for failing newspapers, Congress' intent was to preserve journalistic competition, even if it resulted in some measure of loss of economic competition.

Just as two competing newspapers have an opportunity to succeed or fail in the economic and journalistic marketplace, two newspapers are entitled to expect the protection of the Newspaper Preservation Act if and only if one's failure is due to an evolutionary process of legal competitive behavior. But just as a newspaper should not risk victory by below-cost pricing, neither should such pricing serve as justification for eliminating economic competition between newspapers.

Rewarding the conduct here with a "premature" JOA justifies the otherwise irrational short-term behavior of the parties, and is contrary to congressional intent. Congress' intent was never to condone such below cost pricing in order to justify a JOA. "Making the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the 'frame of reference [Congress] essentially embraced'" *Michigan Citizens*, 868 F.2d at 1300 (Ruth B. Ginsburg, J., dissenting).

C. The Decision Creates a Blueprint for Destruction of Newspaper Competition in Little Rock and Elsewhere

The danger evident from affirming the Attorney General's approval of the Detroit papers' JOA is that it endorses the anticompetitive tactics used. A chain such as Gannett can acquire the dominant newspaper and create in any two-newspaper market a situation where its competitor faces "probable failure" as the Attorney General defines it. Gannett is the largest newspaper company in the United States, owning more than ninety newspapers that generated more than three billion dollars in revenue and \$590 million in pre-tax income in 1987. ALJ at 10; Gannett Co., Inc., 1987 Annual Report 53 (1988). Indeed, Gannett owns and operates newspapers in six of the twenty markets with JOAs. *Editor & Publisher*, Aug. 13, 1988, at 15.

The situation in Little Rock illustrates starkly the Gannett strategy that approval of this JOA has endorsed. Prior to 1986, Gannett intentionally avoided buying newspapers in competitive two newspaper markets. But in 1986 Gannett's strategy changed as it acquired profitable newspapers in two such markets, Detroit and Little Rock. Prior to its acquisition in 1986 by Gannett, the *Arkansas Gazette* had operated profitably for every year of the Twentieth Century, including the years of the Great Depression. Hussman Affidavit, ¶ 3.¹² Since acquiring the *Arkansas Gazette*, Gannett has operated the paper at an intentional and substantial loss for the apparent purpose of forcing the *Democrat* to

¹² The Affidavit of Walter E. Hussman, Jr., the publisher of the *Arkansas Democrat* and Chief Executive Officer of Little Rock Newspapers, Inc., dated August 31, 1988, submitted as part of the record in the district court, was an Addendum to LRNI's *amicus* brief in the court of appeals and is found at Appendix B hereto.

incur more substantial losses. *Id.* As was done in Detroit, Gannett increased discounting of circulation prices to unprecedented levels, increased promotional expenditures to record highs, and reduced advertising rates after the *Arkansas Democrat* implemented rate increases. Hussman Affidavit, ¶ 5; cf. ALJ at 19-20.

On Sunday, August 14, 1988, six days after approval of the Detroit JOA but before this case had been filed, Gannett made its move in Little Rock. It reduced home delivery subscription rates to all subscribers by 57.5 percent. Hussman Affidavit, ¶ 6. In addition, the *Gazette* announced that it would deliver tens of thousands of Friday and Saturday newspapers free. *Id.* This reduction was made at a time when the *Gazette's* circulation was already increasing. The *Gazette*, already losing millions, could face approximately \$7 million in additional operating losses as a result of this rate reduction. *Id.*, ¶¶ 3, 6. This simple predatory act could only have been done for the purpose of eliminating the *Arkansas Democrat* from the market or forcing the *Arkansas Democrat* into a JOA, as is evident by contrasting the rates now charged by Gannett in Little Rock with its monthly charges in other markets in which it operates. See Hussman Affidavit, ¶ 8.

If the *Arkansas Democrat* is forced to match losses with a company generating over \$590 million in pre-tax profits, the alternative it ultimately may face is the prospect of elimination from the market unless it acquiesces in a JOA. Like the *Free Press*, there would be no unilateral way out for the *Arkansas Democrat*. So long as Gannett can pursue such a strategy using Detroit as a precedent, Gannett is free to eliminate economic competition in the remaining 25 competitive newspaper markets, capturing all or a JOA share of the monopoly profits.

Monopoly profits under a JOA would be large in Arkansas. They will be enormous in Detroit.¹³ While the *Arkansas Democrat* recognizes that a JOA may provide immediate short-term profits, the *Arkansas Democrat* is more concerned with the longer term and with remaining an independent newspaper. This is a goal encouraged by public policy and the Newspaper Preservation Act itself, but it is dangerously undermined by the panel's decision here.

CONCLUSION

For the reasons stated above, the decision of the court of appeals affirming the Attorney General's approval of the Detroit joint operating agreement should be reversed.

Respectfully submitted,

PAUL L. FRIEDMAN
(Counsel of Record)
ANNE D. SMITH
WHITE & CASE
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-0018

PHILIP S. ANDERSON
PETER G. KUMPE
WILLIAMS & ANDERSON
111 Center Street, Suite 400
Little Rock, Arkansas 72201
(501) 372-0800

Counsel for

Dated: June 30, 1989

Little Rock Newspapers, Inc.

¹³ Financial analysts currently value the Detroit newspapers at \$400 million; if the JOA goes forward, they say the two Detroit papers will be worth more than \$3 billion in five years. See *N.Y. Times*, Sept. 15, 1988, at D1, D26.

APPENDICES



Drawing Power.

The trend is clear. The Free Press is the newspaper gaining momentum in metro Detroit.

Fact is, Free Press circulation outgained the News in the metro area — two-to-one daily and by an even greater margin on Sunday during the past six months.*

More Detroiters are coming our way because they prefer a quality product. The Free Press is Michigan's most honored newspaper — winner of a 1989 Pulitzer Prize. And the Free Press sports section won a rare triple crown in the recent Associated Press Sports Editors (APSE) national competition, making the top 10 in all three major categories — best daily section, best Sunday section and best special section (the "Seoul '88" Olympic preview). Meanwhile, Mitch Albom was voted the nation's No. 1 columnist for an unprecedented third year in a row.

Take advantage of the upward trend towards the Free Press in Michigan's most lucrative market — advertise in the newspaper that's moving up in metro Detroit.

*Source: ABC FAS-FAX Report, September, '88 vs. March, '89 for six-county C&T.Z.

Detroit Free Press
Michigan's great morning tradition

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-2322

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Plaintiffs,

v.

UNITED STATES ATTORNEY GENERAL RICHARD
THORNBURGH *et al.*,
Defendants.

AFFIDAVIT OF WALTER E. HUSSMAN, JR.

I, Walter E. Hussman, Jr., after being duly sworn do
state:

1. I am a shareholder in the parent company of Little Rock Newspapers, Inc. and its chief executive officer. Little Rock Newspaper, Inc. publishes the *Arkansas Democrat* and I am the president and publisher. The *Arkansas Democrat* is a daily newspaper of statewide circulation with its principal market for readers and advertisers in the central part of the State.

2. Little Rock is one of only approximately twenty-five communities where daily newspapers that are separately owned compete for advertisers and readers. The *Arkansas Democrat* competes with the *Arkansas Gazette*, which is published by the Arkansas Gazette Company. That Arkansas corporation was acquired by Gannett Co., Inc. on December 1, 1986.

3. Until the acquisition by Gannett, the *Arkansas Gazette* had consistently been a profitable newspaper. The *Gazette* had been operated at a profit every year of the Twentieth Century, including the years of the Great Depression. It was and remains the dominant newspaper in the Little Rock market with a larger share of advertising and more subscribers than the *Democrat*. Since acquiring the *Gazette* Gannett has operated the newspaper at a substantial loss with the apparent intention of forcing the *Democrat* to incur more substantial losses. According to an article in the *New York Times*, which appeared on August 18, 1988, Merrill Lynch reported the *Gazette's* losses to have reached ten million dollars per year. (See Exhibit A.)

4. Since 1979 the *Democrat* has progressed within the Little Rock market from a failing newspaper to a viable competitor of the *Gazette* with increasing readers, advertisers, and revenues. But for Gannett's change in the pricing policies and practices of the *Gazette*, the *Democrat* would have become a profitable newspaper. This profitability could have been achieved while the *Gazette* retained dominance and continued profitability. These circumstances prove that Little Rock can support two, separately-owned, competing newspapers.

5. Gannett's strategy in Little Rock appears to be to engage in predatory pricing and practices for both advertising and circulation. Although it is the dominant newspaper with some 60% of the revenues, Gannett's *Gazette* has repeatedly offered advertising rates lower than those offered by the *Arkansas Democrat*. Gannett has also increased discounting of circulation prices and promotional spending to unprecedented levels. In many cases Gannett has intentionally tried to reduce the revenues of the *Arkansas Democrat*. For example, on March 1, 1987, four months after Gannett bought the *Gazette*, the *Democrat* implemented a 6% advertising rate increase. The next day, March 2, Gannett reduced *Gazette*

advertising rates with some rates cut as much as 50%. These tactics by Gannett, however, were subtle and repetitive rather than dramatic. After Attorney General Meese announced approval of the Detroit joint operating agreement, these subtle tactics changed dramatically.

6. On Sunday, August 14, six days after approval of the Detroit JOA by Attorney General Meese, Gannett announced in the Sunday edition of the *Arkansas Gazette* plans to reduce circulation of home delivery subscription rates to all *Gazette* subscribers by 57.5% (see Exhibit B). This move will cost the *Gazette* approximately seven million dollars in operating revenues. This type price reduction is unprecedented in the newspaper industry. This across-the-board price reduction enhances the dangerous probability of eliminating newspaper competition in Little Rock, regardless whether the *Democrat* matches the offer.

7. This price reduction comes at a time when the *Gazette* is reporting circulation increases and has circulation dominance. On the most recent Audit Bureau of Circulation publisher's statement for the six months ending March 31, 1988, the *Gazette* had 139,448 daily and 201,773 Sunday circulation compared to 102,152 daily and 187,114 Sunday circulation at the *Democrat*.

8. New rates charged by Gannett for its *Arkansas Gazette* means a subscription price change from \$1.98 to 85¢ per week. Sunday-only prices were reduced from 60¢ per week to 20¢ per week. At these lower prices, all Sunday-only subscribers will get the Friday and Saturday paper free. At 85¢ per week, the *Arkansas Gazette* will have the lowest subscription prices of any seven-day paid daily circulation paper of over 20,000 circulation in the United States. At 85¢ per week, less than \$3.69 per month, the *Arkansas Gazette* rate is substantially below rates charged by any of Gannett's

other ninety daily newspapers. By contrast the monthly charges of other Gannett papers are:

	Daily & Sunday	Sunday Only
Shreveport (La.) Times	\$11.25	\$6.25
Springfield (Mo.) News	\$10.85	5.45
Nashville (Tenn.) Tennessean	13.00	6.50
Jackson (Ms.) Clarion-Ledger	12.00	5.50
Hattiesburg (Ms.) American	9.00	4.35
Monroe (La.) News Star World	9.00	5.50
Muskogee (Okla.) Phoenix	8.75	3.15
Arkansas Gazette	3.69	0.83

9. Although Little Rock Newspapers, Inc. is part of a family-owned holding company, Gannett's pockets are far deeper than those behind the *Arkansas Democrat*. Gannett has revenues of over three billion dollars compared to seventy million dollars for the owners of the *Democrat*.

10. Attorney General Meese's decision to overrule the Justice Department Administrative Law Judge appears to have removed any restraint imposed on Gannett with respect to its corporate goal of eliminating competition from the *Democrat* either through forcing it out of business or into a joint operating agreement.

/s/ Walter E. Hussman, Jr.
WALTER E. HUSSMAN, JR.

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 31 day of August, 1988.

/s/ Neita D. Nattis
Notary Public

My Commission Expires:
April 20, 1990.

EXHIBIT A

The New York Times, Thursday, August 18, 1988

MARKET PLACE

Philip E. Ross

Detroit's Papers: What Pact Means

The Justice Department's decision last week to allow The Detroit Free Press and The Detroit News to merge their business operations promises to turn red ink into black if the arrangement is upheld by the courts. A Federal district judge yesterday stayed the agreement until mid-September.

The two papers have sustained large losses for many years and argued that they needed to combine business operations to return to profitability. But despite the approval of the agreement last week, the stocks of the Gannett Company, which publishes The News, and of Knight-Ridder Inc., which publishes The Free Press, have fallen slightly since the announcement.

Gannett's shares closed yesterday at \$31.75, up 12.5 cents, and Knight-Ridder's at \$39.75, down 37.5 cents.

* * *

Analysts generally counseled against looking for any quick profits at the two companies because the industry in general is being squeezed by rising newsprint costs and falling advertising linage. Nonetheless, they said the two chains, and particularly Gannett, were worth holding for their long-term prospects. Gannett's newspapers, they added, had more room for growth.

Through the Joint Operating Agreement, Gannett and Knight-Ridder are dividing monopoly profits in the sixth-largest market in the country by consolidating their ad-

vertising and administrative staffs. Editorial independence will not be sacrificed, executives at both chains said, although the weekday News will no longer be published in the morning, head-to-head with The Free Press.

They are to run the papers through a joint venture, the Detroit News Agency, with Gannett holding a majority of the directorships and receiving 55 percent of the profits. Decades of price competition will end tomorrow, when the price of each paper will rise on weekdays by 5 cents, to 20 cents for The News and to 25 cents for The Free Press. The Sunday paper, which is to be produced jointly by the staffs of the two papers, will rise 25 cents, to \$1. Advertising rates will also go up.

Gannett's market price had already reflected most of the gains from the agreement, analysts said, because the company stood to win no matter what the Justice Department decided. Knight-Ridder had pledged to close The Free Press if the plan was rejected, and that would have handed Gannett a monopoly in Detroit.

For its part, Knight-Ridder has just made some acquisitions that have the effect of diluting the immediate benefits of the joint agreement, analysts said.

John S. Reidy, an analyst for Drexel Burnham Lambert in New York, said that by 1991 the business combination should raise corporate earnings by 15 to 20 cents a share for Gannett and by 50 to 60 cents a share for Knight-Ridder, which has one-third as many shares outstanding.

He expects Knight-Ridder to earn \$3.05 a share this year and \$3.25 a share next year, and predicts that Gannett will earn \$2.25 a share and \$2.50 a share in those periods. "We've had Gannett on our recommendation list, but not Knight-Ridder, because we felt they're going to have tough times with their slower-growth papers"

like The Miami Herald and The Philadelphia Inquirer, he said.

Bruce Thorp, a media analyst for the Provident National Bank in Philadelphia, said this year's results may actually be hurt by the accord because of severance payments and other consolidation costs. "But I'm still not recommending either stock because the overall business is so bad," he said. "It's almost as if a recession has hit newspapers already with advertisers cutting back." He expects Knight-Ridder to earn \$2.95 a share this year and \$3.20 next year, and Gannett to earn \$2.25 a share this year and \$2.40 next.

Peter Falco, an analyst for Merrill Lynch in New York, said the swing would be 20 to 25 cents a share for Gannett and 55 to 65 cents a share for Knight-Ridder. But he said Knight-Ridder had made acquisitions in the last six weeks that could dilute its earnings by 30 cents a share.

* * *

Gannett also has had a tendency to spend on long-term projects, like USA Today, its national newspaper, Mr. Falco said. Mr. Falco said that a year ago he thought that Allen H. Neuharth, chairman of Gannett, wanted only to bring USA Today to the break-even point. But now, he said, Mr. Neuharth, appears to want the paper to be profitable, a task that requires much more money.

"Beyond that, Gannett is investing in a little paper, The Arkansas Gazette, and could lose \$10 million," Mr. Falco added.

Mr. Falco said the market cared more about the short term and the two media companies cared more about the future. "It would certainly increase the enthusiasm of investors for the joint operating agreement if they thought they were going to see some of it in earnings," he said.

EXHIBIT B

ARKANSAS GAZETTE

Little Rock, Sunday, August 14, 1988

DEAR READERS

If news is an event that's unusual, then this is front page news.

The price of something is going down.

Starting Monday, the *Arkansas Gazette* will cost only 85 cents a week. The only catch is you have to be a seven-day-a-week, home delivery subscriber and pay by mail 12 weeks in advance.

Previously, the same *Gazette* cost \$1.98 a week. (If you're currently a subscriber, you'll get the new, lower rate automatically when your current subscription expires.)

We're cutting our price for a couple of reasons to become more competitive in this most competitive newspaper state and to give our readers some good news as inflation seems to be creeping upward again.

In the last few months, we've introduced an improvement every month in the *Gazette*. In April, we unveiled the new Sunday Forum section. In May, we started the Tuesday Health and Fitness section in Features. In June, we started three locally tailored new sections to better cover Pulaski and Saline counties. In July, we added two extra pages a day to the Sports section, which gave us room for a daily outdoors/recreation page, a second baseball page and other additional features and coverage.

The price reduction is August's improvement.

The *Gazette* will be adding more improvements. Remaining "Arkansas's Best Newspaper" requires it.

WILLIAM T. MALONE
Publisher of the Gazette

FILED

JUN 30 1989

JOSEPH F. SPANIOL, JR.
CLERK

10

No. 88-1640

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
v. *Petitioners,*

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONERS MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS FROM WILLIAM D. McMASTER,
McMASTER COMMUNICATIONS, INC. AND
MICHIGAN INVESTOR GROUP

LAWRENCE PATRICK NOLAN
LAWRENCE P. NOLAN AND
ASSOCIATES, P.C.
239 S. Main St.
Eaton Rapids, MI 48827
(517) 663-3306

QUESTIONS PRESENTED

1. Did Knight-Ridder, Inc., owner of The Detroit Free Press, deliberately withhold relevant facts on its *corporate option to sell The Detroit Free Press* rather than shut it down if the Detroit Joint Operating Agreement (JOA) is not approved under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*?

2. Does purposeful avoidance by Knight-Ridder, Inc. to consider or disclose obvious opportunities to sell The Detroit Free Press constitute sufficient reason to believe that Attorney General Ed Meese was misled, or acted in ignorance, when he stated in his brief that he was granting the Detroit JOA "to save the Free Press"?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF THE AMICUS CURIAE	1
JURISDICTION	2
STATUTES AND REGULATIONS	2
STATEMENT	3
ARGUMENT	3
KNIGHT-RIDDER, INC. REFUSED OFFERS TO PURCHASE THE DETROIT FREE PRESS..	3
QUESTIONS ANSWERED	5
CONCLUSION	6
 APPENDIX	
Exhibit 1	
McMaster letter to Knight-Ridder	1a
Exhibit 2	
Knight-Ridder response to McMaster	3a
Exhibit 3	
McMaster response to Knight-Ridder	4a
Exhibit 4	
Second Knight-Ridder response to McMaster	6a
Exhibit 5	
Detroit Free Press story	7a
"Answer fought on OFFER TO PURCHASE FREE PRESS"	
Exhibit 6	
Detroit News story	9a
"Public Relations Exec. Reviews Effort to Pur- chase Free Press"	

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITIONERS MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS FROM WILLIAM D. McMASTER,
McMASTER COMMUNICATIONS, INC. AND
MICHIGAN INVESTOR GROUP**

INTEREST OF AMICUS CURIAE

Amicus William D. McMaster, 50, who operates McMaster Communications, Inc., headquartered in Bloomfield Hills, Michigan, initiated his plan to purchase The Detroit Free Press in December 1988 as an alternative to Knight-Ridder, Inc. shutting it down. He and his 30 investors, called the Michigan Investor Group, are one of the potential and capable buyers of The Detroit Free Press.

The Michigan Investor Group communicated to Knight-Ridder, Inc. numerous times that, if successful in purchasing the tenth largest daily newspaper in America, it will continue the 157 year-old Detroit Free Press as an ongoing enterprise and convert the editorial format to a "statewide community newspaper" with Michigan investors, Michigan management and Michigan writers marketing their product to Michigan readers and advertisers.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and the order denying rehearing en banc was entered on February 24, 1989 (Pet. App. 164a, 199a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

STATUTES AND REGULATIONS

The Newspaper Preservation Act, 15 U.S.C. Sec. 1801, *et seq.*, provides in pertinent part:

Section 1802 (5): The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

STATEMENT

Detroit is the nation's fourth largest market in terms of overall newspaper circulation, exceeded only by New York, Chicago and Los Angeles.

The Detroit Free Press, one of 29 daily newspapers published by Miami-based Knight-Ridder, Inc., has the 10th largest circulation in America.

In 1981, the Free Press devised a marketing plan that would "guarantee an iron-clad case for a Joint Operating Agreement (JOA) in Detroit." Unfortunately the plan called for achieving market dominance over The Detroit

News and has been almost suicidal to shareholders of Knight-Ridder, Inc.

ARGUMENT

KNIGHT-RIDDER, INC. REFUSED OFFERS TO PURCHASE THE DETROIT FREE PRESS

In 1983, Knight-Ridder, Inc. aborted at the last minute an offer by a Michigan investor to purchase The Detroit Free Press. The selling price was agreed to be \$125 million.

On May 9, 1986, The Detroit Free Press and Detroit News filed an application for approval of a JOA. Nowhere in the application did the Free Press admit that its later discredited "downward spiral" could be simply remedied by *selling* The Free Press.

Attorneys for The Detroit Free Press successfully argued against any intervenors being granted standing in the 1987 hearings conducted by Administrative Law Judge Morton Needelman who could creditably testify that The Free Press could be sold rather than shut down if the JOA was denied.

In fact, only the Mayor of the City of Detroit and some of the unions representing Free Press employees were allowed to intervene. Free Press readers and advertisers were excluded, along with potential purchasers.

On December 29, 1987, Administrative Law Judge Morton Needelman ruled that the JOA should be denied because The Free Press does not qualify as a failing newspaper under the Newspaper Preservation Act.

Salvage value of The Free Press, if the JOA was not approved, was reported in 1977 to be \$50 million. In addition, over 2,500 jobs would be lost in the process.

A public opinion poll of Detroit Free Press readers and advertisers indicated that 83 percent were opposed to the Joint Operating Agreement.

On August 8, 1988, four days before leaving office, Meese granted the Detroit JOA stating in his brief that he considered it "necessary to save The Free Press".

By refusing to put The Free Press up for sale, counting instead on Court approval of the monopoly with The Detroit News, Knight-Ridder gambled and lost \$159 million in Shareholders' Deficit by blindly continuing with the mistaken market strategy of seeking market dominance.

Meanwhile, Knight-Ridder, Inc. engaged a New York investment banking firm to sell two of its unprofitable newspapers (Star News in Pasadena and the Post Tribune in Gary), and its entire network of eight television stations. Also, Knight-Ridder, Inc. shut down its JOA partner, in Miami, The Miami News, leaving only The Miami Herald publishing.

Selling The Free Press now will save Knight-Ridder shareholders the risk of management bleeding the company throughout 1989 and into the 1990's.

Starting on December 19, 1988, William D. McMaster, a Bloomfield Hills, Michigan public executive, began communication with James K. Batten, President and CEO of Knight-Ridder, Inc. about the sale of The Detroit Free Press to his Michigan Investor Group. (See Exhibits 1-4; December 19 McMaster letter to Batten, December 21 Batten letter to McMaster, December 23 McMaster letter to Batten, December 23 Batten letter to McMaster.)

On April 5, 1989, David Lawrence Jr., Publisher of The Detroit Free Press, posted a notice to over 2,000 employees that they would soon be receiving at their homes 60-day job termination notices "almost identical" to the ones sent on December 5, 1988.

"The Friendly Fast Facts No. 48" cited the Worker Adjustment and Retraining Notification Act and the pending action of the Supreme Court. Through this

method, The Free Press management pointedly began to take the required steps to shut down The Free Press if the JOA is not approved.

On April 16, 1989, McMaster requested from Batten "financial statements in order for our Michigan Investor Group to submit an offer to purchase The Detroit Free Press from Knight-Ridder, Inc. by April 27, 1989".

The April 19 edition of The Detroit Free Press printed the following paragraph in its story headlined, "ANSWER SOUGHT ON OFFER TO PURCHASE FREE PRESS": (See Exhibit 5.)

"Alvah H. Chapman Jr., chairman of Knight-Ridder, Inc., said Tuesday he had not seen McMaster's letter, but said: "I haven't any comment on his latest epistle.

The paper is absolutely not for sale."

The same day, the Detroit News published a story under the heading, "PUBLIC RELATIONS EXEC RE-NEWS EFFORT TO PURCHASE FREE PRESS": (See Exhibit 6.)

"But Knight-Ridder Vice President Frank Hawkins Jr. said the newspaper is not for sale. McMaster 'might as well write to the president and offer to buy the White House' Hawkins said.

"Hawkins said Knight-Ridder has 'no obligation, no incentive and no reason' to provide the information."

"It's a free country, (McMaster) can make all the offers he wants, but there's nothing for sale,' Hawkins said."

QUESTIONS ANSWERED

1. Knight-Ridder, Inc. continues to falsely maintain that its only alternative to a Detroit Joint Operating Agreement is to shut down The Detroit Free Press.

2. Former Attorney General Meese, and the Courts, were, and continue to be, deceived by the highest ranking Knight-Ridder executives who testified that the only way to "save The Free Press" is with a monopoly. Yet, away from the eyes and ears of the Attorney General and the Courts in Washington, D.C., Knight-Ridder derides potential purchasers of The Free Press. Sale of The Free Press has always been a logical corporate alternative to a Detroit JOA or newspaper shut down.

CONCLUSION

Sale of The Free Press would disqualify Knight-Ridder as an applicant for a Joint Operating Agreement. As Judge Needelman determined, there is no need for a JOA in order to "save The Detroit Free Press".

The Newspaper Preservation Act states:

"The term "failing newspaper" means a newspaper publication which, *regardless of its ownership or affiliations*, is in probable danger of financial failure."

Refusal to sell The Free Press has artificially created a loss condition which is normally remedied in American business by the sale of the on-going enterprise to the most capable buyer.

The petition for a writ of certiorari requested by Michigan Citizens For An Independent Press should be granted.

Respectfully submitted,

LAWRENCE PATRICK NOLAN
LAWRENCE P. NOLAN AND
ASSOCIATES, P.C.
239 S. Main St.
Eaton Rapids, MI 48827
(517) 663-3306

APPENDIX

1a

APPENDIX

(EXHIBIT 1)

[SEAL]

McMASTER COMMUNICATIONS, INC.
2655 Woodward Avenue, Suite 160
Bloomfield Hills, Michigan 48013
(313) 332-6900
FAX: (313) 332-6904

Marketing
Public Relations
Advertising
Since 1968

December 19, 1988

Mr. James K. Batten, President
KNIGHT-RIDDER, INC.
One Herald Plaza
Miami, FL 33132-1693

Dear Mr. Batten:

Satisfied that initial and discreet explorations confirm the potentiality of forming a company to purchase and profitably operate The Detroit Free Press *if the Detroit JOA is not approved*, I now request a 15-minute appointment in your office later *this week*.

Among the diverse Michiganians I have approached recently is Ed Wendover of Citizens for an Independent Press. Frankly, Mr. Batten, I've been a part of that group since its inception and share its goal of keeping The Free Press operating independently.

It is also common belief of the dynamic individuals with whom I'm exploring the future of Free Press local ownership that any forthcoming proposal to purchase The Free Press should endeavour to retain as many of

2a

your current employees as is practical. Stock ownership may be feasible.

Be assured that our interest in The Free Press is dependent upon three factors:

1. Determination by the U.S. Court of Appeals that a Detroit JOA would be illegal.
2. Establishment of normal cooperation expected of a NYSE-listed company with a potential suitor for one of its properties.
3. Absence of publicity initiated by any party.

Sincerely,

/s/ William D. McMaster
WILLIAM D. MCMASTER.
President

3a

(EXHIBIT 2)

KNIGHT
RIDDER

James K. Batten
President and
Chief Executive Officer
(305) 376-3868

Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132-1693

December 21, 1988

Mr. William D. McMaster
President
McMaster Communications, Inc.
2655 Woodward Avenue, Suite 160
Bloomfield Hills, Michigan 48013

Dear Mr. McMaster:

Thanks for your letter of December 19, expressing interest in purchasing the *Detroit Free Press* if the JOA is ultimately not approved.

We continue to be optimistic about prospects for approval by the federal courts.

For that reason, I see no reason to pursue the matter at this time.

In the unlikely event that the Free Press should ever be offered for sale, I will assure that you are among those promptly notified.

Sincerely,

/s/ James K. Batten
JAMES K. BATTEN

JKB/so

(EXHIBIT 3)

[SEAL]

McMASTER COMMUNICATIONS, INC.
 2655 Woodward Avenue, Suite 160
 Bloomfield Hills, Michigan 48013
 (313) 332-6900
 FAX: (313) 332-6904

Marketing
Public Relations
Advertising
Since 1968

December 23, 1988

Mr. James K. Batten, President
 KNIGHT-RIDDER, INC.
 One Herald Plaza
 Miami, FL 33132-1693

Dear Mr. Batten:

According to Detroit newspaper accounts early this month, The Detroit Free Press issued 60-day termination notices to its 2,017 employees that "the Free Press will be closed if a joint operating agreement between the papers is denied."

A story in The Detroit News on December 6, 1988 states:

Free Press owner Knight-Ridder, Inc. vowed months ago to close or sell the Free Press without a JOA.

"If the JOA is denied, notice under the act is hereby given that the Detroit Free Press will shut down all operations and terminate all employees," the letters say.

The legal decision on the Detroit JOA may be just hours away. Certainly the timing of your termination

notices to Free Press employees is strong indication that you expect the decision by the end of next month. Thus, *60-days' notice.*

I'm concerned that your letter received here this morning is attempting to take a private position on a public issue. The Free Press is important to potential investors, readers and advertisers, as well as to Free Press employees, as an ongoing enterprise.

There is also a corporate responsibility of Knight-Ridder, Inc., as a New York Stock Exchange listed company, to make contingency plans to safeguard Knight-Ridder's shareholder investment in The Detroit Free Press.

Time is obviously short, Mr. Batten. By indicating in published statements that you will either shut down The Free Press or sell it, you publicly put The Free Press "in play" several months ago.

I urge you to reconsider your private position to coincide with your public position and give me access to Free Press financial figures so that we may prepare an informed offer to purchase that significant Michigan operation.

Cordially,

/s/ Bill McMaster
 WILLIAM D. McMASTER

6a

(EXHIBIT 4)

KNIGHT
RIDDER

James K. Batten
President and
Chief Executive Officer
(305) 376-3868

Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132-1693

December 23, 1988

Mr. William D. McMaster
President
McMaster Communications, Inc.
2655 Woodward Avenue, Suite 160
Bloomfield Hills, Michigan 48013

Dear Mr. McMaster:

As you know, we are committed to pursuing the JOA application to its ultimate conclusion. We continue to be optimistic about prospects for approval.

If, contrary to our expectations, the JOA is not finally approved, we will give due consideration to all our varied obligations to our employees, shareholders and the Detroit community.

Under these circumstances no purpose would be served by the sort of meeting you propose.

Sincerely,

/s/ Jim Batten
JAMES K. BATTEN

JKB/so

7a

(EXHIBIT 5)

Wednesday, April 19, 1989

BUSINESS
Detroit Free Press

ANSWER SOUGHT ON AN OFFER TO
PURCHASE FREE PRESS

BY CHRISTOPHER COOK
Free Press Staff Writer

William McMaster, the Bloomfield Hills public relations public relations consultant who has assembled an investor group interested in buying the Free Press, plans to go ahead without waiting for court action on the pending Free Press/Detroit News joint operating agreement.

McMaster "urgently requested" that Knight-Ridder Inc., which owns the Free Press, provide financial information so his group can make a purchase offer before the company's April 28 shareholder meeting.

In a four-page letter to Knight-Ridder President James K. Batten, McMaster said: "We are now removing the Detroit JOA as consideration in our offer to begin negotiations leading to the purchase of the Detroit Free Press."

Neither McMaster nor Batten could not be reached for comment on the letter, dated April 16.

Alvah H. Chapman Jr., chairman of Knight-Ridder Inc., said Tuesday he had not seen McMaster's letter, but said: "I haven't any comment on his latest epistle. The paper is absolutely not for sale."

In December, McMaster approached Knight-Ridder about buying the Free Press if the JOA were denied. He has said his group comprises 30 state business leaders and has said financing is not a problem.

In his letter, he said selling the paper, rather than spending "untold millions of dollars more" to seek JOA approval, would be "a practical, realistic and overdue action."

Knight-Ridder has said that it anticipates a favorable ruling on the JOA. The company has said it would close the Free Press if the JOA were denied, but has not ruled out a sale at that time.

The JOA was approved by then-Attorney General Edwin Meese in August but has been delayed until the U.S. Supreme Court decides whether it will consider an appeal from a group of Michigan advertisers and readers who want the JOA stopped. If the court refuses to hear their case, the newspapers have said they would quickly launch the JOA.

If the court accepts the appeal, a final decision could be a year away.

(EXHIBIT 6)

The Detroit News
Wednesday, April 19, 1989

PUBLIC RELATIONS EXEC RENEWS EFFORT TO PURCHASE FREE PRESS

Bloomfield Hills public relations executive William McMaster said Tuesday he and a group of investors will make an offer to buy the Detroit Free Press by April 27.

But Knight-Ridder Vice-President Frank Hawkins Jr. said the newspaper is not for sale. McMaster "might as well write to the president and offer to buy the White House," Hawkins said.

The U.S. Supreme Court is expected to decide soon whether to hear an appeal of the approval of a joint operating agreement between the Free Press and The Detroit News. Lawyers involved in the case believe the court will consider the matter as early as April 28.

If the court declines to hear the appeal, the Free Press and The News will merge business operations, split profits and publish joint weekend editions while keeping separate editorial staffs.

If the court takes the appeal, a final decision probably wouldn't come for a year. If the JOA is ultimately denied, Knight-Ridder has said it will close or sell the Free Press.

In a letter Monday to Knight-Ridder President and Chief Executive James K. Batten, McMaster requested recent Free Press financial data to help the group prepare an offer before Knight-Ridder's annual shareholder meeting April 28.

Hawkins said Knight-Ridder has "no obligation, no incentive and no reason" to provide the information.

"It's a free country, (McMaster) can make all the offers he wants, but there's nothing for sale," Hawkins said.

— *Bryan Gruley*

12

Supreme Court, U.S.

~~FILED~~

No. 88-1640

AUG 10 1989

JOSEPH F. SPANIOL, JR.
CLERK

**IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989**

**MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,**

v.

**RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.**

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia**

**BRIEF AMICI CURIAE OF
JAMES BLANCHARD, JOHN ENGLER, ART MILLER,
LEWIS N. DODAK, PAUL HILLEGONDS, ED McNAMARA,
ERMA HENDERSON, DONALD W. RIEGLE, JR., CARL LEVIN,
JOHN D. DINGELL, DAVID E. BONIOR, ROBERT W. DAVIS,
DENNIS M. HERTEL, DALE E. KILDEE, SANDER M. LEVIN,
BILL SCHUETTE, BOB TRAXLER, GUY VANDER JAGT
and HOWARD WOLPE
IN SUPPORT OF RESPONDENTS**

**Richard C. Van Dusen*
Robert W. Powell
DICKINSON, WRIGHT, MOON, VAN DUSEN
& FREEMAN
800 First National Building
Detroit, Michigan 48226
(313) 223-3500**

*** Counsel of Record**

6 p12

1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

¹BRIEF AMICI CURIAE OF
JAMES BLANCHARD, JOHN ENGLER, ART MILLER,
LEWIS N. DODAK, PAUL HILLEGONDS, ED McNAMARA,
ERMA HENDERSON, DONALD W. RIEGLE, JR., CARL LEVIN,
JOHN D. DINGELL, DAVID E. BONIOR, ROBERT W. DAVIS,
DENNIS M. HERTEL, DALE E. KILDEE, SANDER M. LEVIN,
BILL SCHUETTE, BOB TRAXLER, GUY VANDER JAGT
and HOWARD WOLPE
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

This brief is submitted by a group of elected national, state and local government officials from the State of Michigan. Consents of the parties to the filing of this brief have been filed with the Clerk. Together, the amici represent a constituency encom-

passing the entire State of Michigan, as well as particular political subdivisions of Detroit, Wayne County and Southeastern Michigan. The amici and their constituency share an interest in the preservation of competitive and diverse news gathering organizations and editorial voices in their community. The amici are more fully described below:

James Blanchard is the Governor of the State of Michigan.

John Engler is the Majority Leader of the Michigan State Senate.

Art Miller is the Minority Leader of the Michigan State Senate.

Lewis N. Dodak is the Speaker of the Michigan House of Representatives.

Paul Hillegonds is the Minority Leader of the Michigan House of Representatives.

Ed McNamara is the County Executive for Wayne County, Michigan.

Erma Henderson is President of the Detroit City Council.

Donald W. Riegle, Jr., is a United States Senator from Michigan.

Carl Levin is a United States Senator from Michigan.

John D. Dingell is a United States Representative from Michigan and the Senior Member of the Michigan Congressional Delegation.

David E. Bonior is a United States Representative from Michigan.

Robert W. Davis is a United States Representative from Michigan.

Dennis M. Hertel is a United States Representative from Michigan.

Dale E. Kildee is a United States Representative from Michigan.

Sander M. Levin is a United States Representative from Michigan.

Bill Schuette is a United States Representative from Michigan.

Bob Traxler is a United States Representative from Michigan.

Guy Vander Jagt is a United States Representative from Michigan.

Howard Wolpe is a United States Representative from Michigan.

ARGUMENT

As elected officials in Detroit and Michigan, we support the approval of the joint operating arrangement between the Detroit Free Press and the Detroit News and urge the Supreme Court to affirm the decision of the U.S. Circuit Court of Appeals. The JOA represents the only means available, we believe, for maintaining two strong, independent voices in the Detroit community. Because both Detroit newspapers circulate throughout much of the state, App. 54a, their role is important for all of Michigan. The death of the Free Press would mean that the quality and breadth of public debate in the community would be greatly diminished.

We are persuaded that, without the JOA, the Free Press will close. For a decade now, we have watched the Free Press struggle against mounting, multi-million dollar deficits. The newspaper, we believe, meets the law's description of a "failing newspaper." 15 U.S.C. §1802(5). Its well-documented losses, resulting from the decades-long competition with the Detroit News, cannot be sustained indefinitely. We have witnessed significant infusions of capital to provide improved facilities and to cover losses without significant change in the Free Press's fortunes. App. 76a-77e; JA

566-573. We believe Knight-Ridder Inc., the parent company of the Free Press, when it says it will close the newspaper in the absence of a joint operating arrangement. (Applicants' Exceptions to the Recommended Decision of the Administrative Law Judge at 7-8; 1988 Annual Report at 16.)

The community as a whole would be diminished by the loss of the Free Press. The News and the Free Press are Michigan's only statewide newspapers. They frequently disagree with each other and with us. The clash of editorial philosophies and diversity of viewpoints provided by the two papers is important to public debate in Michigan. Out of the spirited discussion of policy questions, the citizens of Detroit and of Michigan are better able to inform themselves and make up their own minds. What is important to us and to the community is to have the diversity of voices. While we frequently disagree with one and sometimes both of the Detroit newspapers, we recognize that our citizens are better informed and better served by having alternative voices available to them.

Congress provided for the possibility of joint operating arrangements precisely for the reasons this JOA is important to Detroit and Michigan: to preserve editorial competition and diversity even where the harsh realities of newspaper economics dictate against the survival of two totally free-standing business entities. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1968). We believe the Detroit JOA provides the only assurance we can have that this community, so accustomed to strong and open debate and to intense newspaper competition, will continue to have these two independent editorial voices and two competent sources of information and ideas.

Therefore, we urge that you uphold the finding of the Attorney General, affirmed by the district court and the USCA and permit the Detroit JOA to take effect.

Respectfully submitted,

DICKINSON, WRIGHT, MOON, VAN DUSEN
& FREEMAN

By:

RICHARD C. VAN DUSEN*
ROBERT W. POWELL
800 First National Building
Detroit, Michigan 48226
(313) 223-3500

* Counsel of Record

August 11, 1989

14

No. 88-1640

Supreme Court, U.S.

FILED

AUG 11 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

BRIEF OF *AMICI CURIAE*
JANE DAUGHERTY, *ET AL.*
IN SUPPORT OF RESPONDENTS
(List of Additional Amici on Inside Cover)

BARBARA HARVEY
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Counsel for Amici Curiae
Jane Daugherty, et al.

Dated: August 11, 1989

2500

**Robin Abcarian
Molly Abraham
Susan Ager
Mitch Albom
Patricia Charget
Catherine Collison
William Collison
Christopher Cook
David Crumm
Owen Davis
Brian Dickerson
John L. Dotson, Jr.
Charles Fancher
Gregory Favre
Jim Fitzgerald
Brian Flanigan
John Goecke
Joe Grimm
Tracee Hamilton
Tim Jones
Georgea Kovanis**

**Jack Kresnak
David Kushma
Hugh McDiarmid
Jeanne May
Robert Maynard
James Neubacher
Patricia Montemurri
Jeanne Moore
Renee Murawski
Robert Musial
Craig Porter
Gene Roberts
Neal Shine
Tony Spina
Barbara Stanton
Martha Thierry
Jacqueline Thomas
Gerry Volgenau
Michael Wagner
Mariusz Ziomecki
Sharon Zumberg**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE ATTORNEY GENERAL CORRECTLY CONSTRUED AND APPLIED THE STATU- TORY STANDARD	3
II. WHERE THE PROPOSED JOA IS THE ONLY MEANS OF PRESERVING EDITO- RIAL DIVERSITY IN THE COMMUNITY, THE ATTORNEY GENERAL MUST CON- STRUE THE TERM "FAILING NEWSPA- PER" TO EFFECTUATE THE PURPOSE OF THE ACT	6
III. THE APPLICANTS' EDITORIAL PERSPEC- TIVES HAVE BEEN HISTORICALLY AND CONSISTENTLY OPPOSING	9
STATEMENT OF <i>AMICI CURIAE</i>	11
A. Editorial Diversity	12
B. Free Press Coverage of Race Relations	14
C. Free Press Investigative Reporting	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945)	8
<i>Committee for an Independent P-I v. Hearst Corp.</i> , 704 F.2d 467 (9th Cir. 1983)	4, 6, 7, 8
<i>Dawson Chemical Co. v. Rohm & Haas Co.</i> , 448 U.S. 176 (1980)	11
<i>United States v. Third National Bank</i> , 390 U.S. 171 (1968)	7
 Statutes and Regulation:	
Bank Merger Act, 12 U.S.C. § 1828 (c)	7
Newspaper Preservation Act, 15 U.S.C. § 1801	6
15 U.S.C. § 1803 (b)	5, 8
35 U.S.C. § 271 (d)	11
 Miscellaneous:	
1970 U.S. Code Cong. & Admin. News 3547	6
S. 1520, 91st Cong., 1st Sess. (Nov. 18, 1969)	7, 8
B. Bagdikian, <i>The Media Monopoly</i> (1983)	13
S. Fine, <i>Violence in the Model City: The Cavanagh Administration, Race Relations and the Detroit Riot of 1967</i> (1989)	15, 16
S. Lacy, "Content of Joint Operation Newspapers," in <i>Press Concentration and Monopoly</i> (Picard, ed. 1988)	19
National Opinion Research Center, <i>General Social Survey</i> (1967, 1989)	3
M.E. Neithercut, <i>Detroit Twenty Years After: A Statistical Profile of the Detroit Area Since 1967</i> (Center for Urban Studies 1987)	12, 14
<i>Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary</i> , 91st Cong., 1st Sess. (1969)	5, 7
B. Widick, <i>Detroit: City of Race and Class Violence</i> (1989)	15, 16, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

BRIEF OF *AMICI CURIAE*
JANE DAUGHERTY, *ET AL.*
IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed with the written consent of all parties.

INTEREST OF *AMICI CURIAE*

Amici curiae are journalists from around the country, most of them now or previously associated with the Detroit Free Press. All are persuaded, most reluctantly, that the unique editorial vitality and diversity enjoyed by the citizens of Detroit can continue to exist only with the assistance of the Newspaper Preservation Act's provision for a joint operating agreement between the city's two competing newspapers.

SUMMARY OF ARGUMENT

The actual editorial diversity that will be preserved by this JOA is precisely what the Newspaper Preservation Act was designed to accomplish. Congress' intent in enacting the Newspaper Preservation Act was to preserve editorial diversity. While neither Congress nor the Attorney General is free to legislate editorial practice or policy, where such diversity actually exists between the newspaper applicants, approval of the JOA is strongly supported by the legislative intent.

The editorial diversity and competitiveness that Congress intended the Act to preserve have long marked Detroit's newspaper industry. Detroit's JOA applicants have been historically committed to fundamentally diverse, often opposing editorial perspectives. Their differences have enriched the community's perception of news events and furthered public policy debates. Coverage by the Free Press has often been the impetus for community change and reform, especially on issues involving race relations.

Loss of the Free Press would deprive a major city whose population is over 70 percent black of a voice that has been particularly sensitive to the concerns of black citizens. While the applicants' counterbalancing political perspectives enrich the community's political debate, loss of the Free Press would mean that the interests of a city with a long tradition of liberal politics would be represented only by an avowedly conservative newspaper.

Affirmance of the decision of the Court of Appeals will serve both the first amendment interest in the wide dissemination of information from diverse and antagonistic sources that Congress intended, and the interests of the citizens of Detroit and Michigan.

ARGUMENT

I. THE ATTORNEY GENERAL CORRECTLY CONSTRUED AND APPLIED THE STATUTORY STANDARD.

In 1967, three years before the Newspaper Preservation Act was enacted, 73 percent of the adults in the United States read a newspaper every day. By 1989, only 50 percent of the adult population read a newspaper every day.¹

The economics of Detroit's newspaper industry that led to the JOA application is detailed in the Brief of Respondent The Detroit Free Press, Inc., and need not be repeated here. It suffices to note that the Free Press determined, in a process that has not been found to be mismanagement, that long-term economic viability in Detroit required it to achieve market dominance. The News reached the same conclusion, and in the midst of a recession and a steadily declining local economy, the "great Detroit newspaper war" was fought to a stalemate, each competitor, and especially the Free Press, having sustained continuous and enormous losses. John Rosse, an expert in the field of newspaper economics who has testified as a witness in every JOA proceeding, concluded, given

"the Free Press' financial losses since 1980, the significant decline in the size and economic vigor of the Detroit market, and the News' lead in advertising revenues as well as certain key circulation areas, . . . that the Free Press viewed on a stand-alone basis is in probable danger of financial failure and can only be saved by a JOA." ALJ rec. dec. 95.

The administrative law judge concluded that

"[T]here can be no serious question that between 1979-1986 the Free Press had deep operating losses,

¹ National Opinion Research Center, *General Social Surveys* (1967, 1989).

that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other person) it could not continue as a going concern on a stand-alone basis. . . . [F]uture profitability could not be accomplished by any additional circulation price increases by either the Free Press or the News which is not followed by the other." *Id.* 70, 77 (footnotes omitted).

Despite the evidence, the administrative law judge construed the Act to require "convincing evidence of an irreversible economic condition that would produce domination and a downward spiral," *id.* 119, and on that ground recommended against approval of the application.

The Attorney General refused to apply so rigid a construction of the Act. He articulated and applied the following standard for a case involving a failing newspaper not yet caught in a downward spiral:

"If, as all seem to acknowledge, the Free Press is unable unilaterally to restore the paper to a profitable position, and has no realistic prospect of outlasting the News, given the latter's substantial advertising and persistent circulation lead, the danger of financial failure, if not imminent, certainly seems 'probable.'" AG dec. 10, 7.

Unlike the "failing company" test, which was a judicially created exemption from the antitrust laws, the NPA's "probable danger of financial failure" test is a specific *statutory* exemption and the expression of a legislative judgment that the first amendment benefits of a vigorous and competitive press outweigh the potential anticompetitive effects of JOAs. Given the first amendment benefits, courts are not free, as petitioners argue, to diminish or belittle the statutory exemption and ought "not to emasculate the Act in the guise of narrowly construing it." *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983).

The Act requires two determinations: that one of the applicants is failing, that is, "in probable danger of financial failure," and that the JOA will further the statutory intent to preserve editorial diversity among a community's newspapers. 15 U.S.C. § 1803(b). Nothing in the language or the history of the Act suggests that it requires a downward spiral as a necessary predicate for every JOA.² To the contrary, the Attorney General's

² The ALJ's only authority for requiring a downward spiral were some comments by Representative Matsunaga, describing a downward spiral as part of the economic dynamic typically requiring a JOA for the survival of the failing newspaper. *Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 10-11 (1969). Nothing in Representative Matsunaga's remarks describing a scenario that would typically compel resort to the NPA, however, warrants the conclusion that a downward spiral would be a required element of proof in every JOA application.

To the contrary, Representative Matsunaga emphasized that newspapers should not be required to wait until they have already entered a downward spiral before being permitted to apply for a JOA:

"It is not reasonable to assume that a newspaper owner who has other resources and whose newspaper has commenced a downward spiral would put good money after bad. It is more likely that such an owner would seek a merger or sell his assets with the resultant loss of an editorial voice in the community." *Id.* 9.

He assumed that proof of a downward spiral, while required to establish the judicially created "failing company" defense, would not be required to qualify for a JOA:

"Where the existence of independence in news and editorial reporting is challenged by faltering commercial operations, then reasonable steps must be taken to assure continuance of independent news sources. This confrontation of conflicting antitrust values compels one to examine the reasonableness of the action, rather than to accept or reject on a mechanistic test.

* * *

"Once a downward spiral, occasioned by the inter-relationship of advertising, circulation and increasing costs, has led a news-

mandate under the statute is to preserve editorial diversity, and he has discretion to construe and apply the definition of "failing newspaper" so as to effectuate the purpose of the Act.

Amici submit that, in a case such as this one, where approval of the JOA does in fact further Congress' intent to preserve diversity of editorial voices, the Attorney General correctly applied the Act.

II. WHERE THE PROPOSED JOA IS THE ONLY MEANS OF PRESERVING EDITORIAL DIVERSITY IN THE COMMUNITY, THE ATTORNEY GENERAL MUST CONSTRUE THE TERM "FAILING NEWSPAPER" TO EFFECTUATE THE PURPOSE OF THE ACT.

Congress left no room for conjecture about the purpose of the Newspaper Preservation Act: It was enacted "[i]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, . . ." 15 U.S.C. § 1801. Both houses of Congress "believed that authorizing certain joint action between newspapers would serve the best interest of the people of the United States and the first amendment." *Committee for an Independent P-I v. Hearst Corp.*, *supra*, 704 F.2d at 474.³ Indeed, the dec-

paper to the crisis point demanded by the failing company doctrine, a competitor is likely to prefer the demise of the ailing newspaper to a cooperative arrangement that, if consummated at an earlier date, could have saved it not only as a commercial enterprise but more importantly, as an alternative independent editorial voice." *Id.* 9, 12.

These remarks were accepted by the Committee in reporting the final version of the Act. 1970 U.S. Code Cong. & Admin. News 3547, 3554.

³ "Nothing is more vital to democratic processes than the reporting of news events and the dissemination of editorial comment and analysis and no industry is more important in the performance of those functions than the newspaper industry. Operating as a private competitive enterprise, a newspaper's

laration of legislative intent expressed in the Act and its legislative history "compel the conclusion that the Act itself is a policy determination that the preservation of editorial diversity through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause." *Id.* 481.

References in the Act's legislative history to the definition of "probable danger of financial failure" utilized in the Bank Merger Act, 12 U.S.C. § 1828(c),⁴ suggest the propriety of noneconomic considerations, such as whether the newspaper identified as failing was put in that position by mismanagement and whether alternatives to a JOA exist. *Committee for an Independent P-I v. Hearst Corp.*, *supra*, 704 F.2d at 478. Consideration of "economic factors which are arguably extrinsic to the newspaper operation," *id.* 477, or relevant noneconomic factors, can only throw more light, not less, on the issue for decision by the Attorney General.

Of the various noneconomic or arguably extrinsic economic factors that might bear upon the propriety of a JOA application, none relates more directly to the legis-

ability to perform its essential role in our society depends not only upon its journalistic excellence, but even more importantly upon its ability to succeed as a commercial venture. . . . We believe that, with respect to the newspaper industry, a choice must be made between fostering editorial competition and diversity on the one hand, and full-blown commercial competition on the other, and that the former must be given precedence." *Newspaper Preservation Act: Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 9-10 (1969) (statement of Rep. Matsunaga on behalf of 59 of 100 sponsors).

"Financially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous or unpopular editorial stands on public issues are an area of legitimate congressional concern." S. 1520, 91st Cong., 1st sess., at 3 (Nov. 18, 1969).

⁴ See *United States v. Third National Bank*, 390 U.S. 171 (1968).

lative intent than whether approving the JOA will in fact preserve diversity of editorial views in the community.⁵ If there is no actual editorial diversity to be preserved by approval of a JOA, there is less of a public interest to counterbalance the anticompetitive effects of the proposed merger.

The first amendment prohibits Congress from legislating editorial independence.⁶ Likewise, the first amendment prohibits the Attorney General from requiring a newspaper to "explore the alternative of changing its editorial policies prior to entering a JOA." See 704 F.2d at 478 n.8. Conversely, "[t]hat Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (Black, J.). It both furthers the intent of Congress and complies with the mandate of 15 U.S.C. § 1803(b) to take into consideration that a proposed JOA will in fact preserve editorial diversity in the community.

As detailed in the Statement of *Amici*, *infra*, the Attorney General's approval of the Free Press-News application does further the intent of Congress by preserving two historically diverse, indeed often passionately antagonistic, editorial perspectives.⁷ The specific terms

⁵ As pointed out by the Court of Appeals for the Ninth Circuit in the Hearst case, the political viewpoint of the newspaper's publisher, as expressed on the editorial pages, certainly affects the newspaper's business success by attracting or repelling readers and cannot be viewed as a "noneconomic" factor. 704 F.2d at 477-78 n.8.

⁶ S. 1520, *supra* n.3, at 12 (individual views of Sens. Hart, Kennedy, Burdick, and Tydings).

⁷ *Amici* have also separately lodged with the Clerk an appendix of newspaper excerpts that support the Statement of *Amici*. These excerpts are not part of the record, nor was it feasible to compile in the appendix all of the many years of newspapers on which the analysis in this brief is largely based.

of the joint operating agreement which the Attorney General approved ensures each newspaper's continuing vitality by guaranteeing minimum and approximately equal newshole for each and also by creating "newshole banks" to be used for special coverage, which are to be charged to each newspaper as they are used. JOA, art. 3.1(a), at 38-39.

III. THE APPLICANTS' EDITORIAL PERSPECTIVES HAVE BEEN HISTORICALLY AND CONSISTENTLY OPPOSING.

The Detroit community enjoys two major newspapers that have dramatically different visions of the world.⁸ That the community actually *enjoys* two fiercely competitive newspapers is reflected in its newspaper readership rates: Detroit's per capita newspaper readership rates are the highest in the United States.⁹

The Free Press has been a unifying influence in the local coverage of race relations. In covering race relations from the early 1960's, and especially during the 1967 riot, the Free Press helped the white community to view racial integration with greater tolerance.¹⁰ Historically, the Free Press has a strong tradition of leadership in investigative and interpretive reporting, identifying social issues and pushing for reforms. Some of the contributions to the quality of life in the community that are attributable to Free Press reporting in recent years are detailed in the Statement of *Amici*.¹¹

The Detroit community recognizes and values the editorial differences between its two major newspapers, as well as the unique contribution made by the Free Press.

⁸ See Statement of *Amici*, *infra*, Part A.

⁹ ALJ rec. dec. 16 and n.19. Duplicate readership between the News and the Free Press is also high. *Id.* 38.

¹⁰ See Statement of *Amici*, *infra*, Part B.

¹¹ See Statement of *Amici*, *infra*, Part C.

The civic community responded to the JOA application by urging the Attorney General to consider the injury to the city's welfare should the JOA be denied. A representative plea was made by Leon Cohan, senior vice president and general counsel of Detroit Edison, president of the Jewish Community Council of Metropolitan Detroit, and chairman of the Michigan Council for the Arts:

"I am especially concerned that the loss of the Free Press would have a particularly adverse effect on race relations in the Detroit metropolitan area. Recent experience as a member of the Race Relations Task Force of the Detroit Strategic Plan convinces me that Blacks in our community already feel isolated by a perception of negative attitudes on the part of the media. The elimination of a major voice for reason, fairness, and moderation would, I feel, seriously exacerbate that sense of isolation."¹²

The historic editorial diversity between the Free Press and the News, as well as the contributions to the quality of community life that may be attributed to Free Press investigatory reporting inspired by the fierce competition between the two newspapers, are precisely what Congress intended to preserve in enacting the Newspaper Preservation Act.

It is peculiarly appropriate to apply the Act's definition of a "failing newspaper" liberally when so doing will in fact accomplish exactly what Congress intended. Whether the Attorney General's construction of the Act in this case was narrow or broad, his application of the statutory terms was most certainly true to the intent of Congress.

¹² App. to Mem. of Det. Free Press in Opp. to Motion for a Temporary Restraining Order or Stay, Ap. 6, Exh. C.

Mr. Cohan's concerns were repeated by the NAACP, United Negro College Fund, Museum of African American History, and the Detroit Association of Black Organizations. *Id.*

Nor is there any basis for the petitioners' argument that the exemption from the antitrust laws that is created by the Act's provision for JOAs must be narrowly construed. The statutorily expressed purpose of the exemption is to promote first amendment interests by preserving editorial diversity. The first amendment interest in preserving editorial diversity certainly "runs no less deep" than the interests served by the patent infringement exemption established by Congress in 35 U.S.C. § 271(d), which this Court refused to construe narrowly in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 220-23 (1980). As reiterated in *Dawson*, antitrust exemptions which Congress created to promote a significant competing interest are not to be narrowly construed. It is difficult to imagine any competing interest more significant than the first amendment interest in preserving the diversity of the press.

STATEMENT OF AMICI CURIAE

Two blocks apart, in a downtown Detroit neighborhood of asphalt parking lots and boarded-up hotels, two neon newspaper logos glow against the night sky. Physically, the buildings occupied by the Detroit Free Press and the Detroit News are on the same street; philosophically, they are a world apart. In an era when the one-newspaper town has become the norm, when Americans get most of their information from a local monopoly newspaper or television's bite-size bits of news, Detroit still enjoys two serious, spirited, greatly dissimilar newspapers.

The two papers have dramatically different visions of the world. Historically, the Free Press has been a force for reform and defender of the disadvantaged, while the Detroit News has been the community's voice for restraint and conservatism. The Free Press has continued to address issues of interest and importance to the city, even though Detroit's population has been shrinking dra-

matically.¹³ The paper has consistently paid attention to the issues and concerns of Detroit's black population. Despite the increasing impoverishment of the city's residents and the often divergent interests of the city and suburbs, the Free Press has not abandoned the central city.¹⁴

A. Editorial Diversity.

The differences between the two papers in Detroit are most visible on their editorial pages, where the News and the Free Press regularly disagree on everything from how to take out the trash¹⁵ to how to resolve the most fundamental social and political issues of the age. Their sharply differing editorial positions go back at least 25 years, and the contrast has not abated in the years since Gannett Co. Inc. bought the News and the parties jointly requested a JOA.

¹³ The city of Detroit lost nearly 33 percent of its population from 1960-1984. It led the 10 largest cities in both population decline and in the racial transformation of its population from white to black. During that time, the suburban community outside Detroit grew from 2,092,216 in 1960 to 2,789,127 in 1984. Detroit's suburban black population was 4.5 percent in 1980, an increase of 0.8 percent over a period of 20 years. This compared to the city's increase in the proportion of its black population, as noted above. "Of the ten largest cities in the U.S., Detroit has the largest proportion of Blacks" M.E. Neithercut, *Detroit Twenty Years After: A Statistical Profile of the Detroit Area Since 1967*, at 4, 6, 7, 40 (Wayne State U. Center for Urban Studies 1987) (referred to hereafter as "Neithercut").

¹⁴ While the entire Detroit metropolitan area, including the suburban communities, suffered an increase in poverty rates from 1960-1984, ALJ rec. dec. 15, Detroit's suffering has far outstripped the suburbs'. The city's poverty rate "has nearly doubled since 1979 and per capita income measured in constant dollars has declined nearly 13 percent since 1969. The poverty rate in the City of Detroit rose from 4.9 percent in 1969 to 42.8 percent in 1984." Neithercut, *supra* n.13, at 40.

¹⁵ The two papers were recently on opposite sides in a controversy over scrubbers and ash disposal at a new city incinerator.

During the civil rights revolution, the Free Press was an early advocate of increased black participation in public life. The Free Press endorsed black candidates for mayor in 1969 and 1973; the News endorsed their white opponents. In the days of police-community tension that followed the 1967 riot, the Free Press advocated stronger civilian control of the police, respect for individual civil liberties in police-citizen conflicts, and affirmative action to change the racial composition of the Detroit Police Department. The News was more often concerned with law and order.

The Free Press has been a more frequent and consistent advocate of improving the environment, human services and public school education. The News has been a strong defender of supply-side economics, the Free Press a strong critic. During the Vietnam era, the Free Press was an early and consistent critic of U.S. involvement in the war, the News a strong proponent of intervention. The Free Press has tended generally to be an advocate of civil liberties, the News a defender of the police powers of the state.

In recent years, the two papers have expressed opposing views on abortion, transportation, welfare policy, campaign financing, utility and insurance regulation, Jimmy Carter and Ronald Reagan. They have differed on the MX missile, the Grenada invasion, the causes of crime, the minimum wage, the validity of the independent prosecutor law, the workings of the Michigan presidential primary, and the best means of opposing apartheid in South Africa.

The clash of ideas on the two editorial pages has become an important feature of public life in Michigan and Detroit. At a time when such media critics as Ben Bagdikian complain of "vanilla journalism" and the blandness of editorial page opinions,¹⁶ Detroit readers

¹⁶ B. Bagdikian, *The Media Monopoly* 78 et seq. (1983).

still have the choice of two distinctively different voices from their daily newspapers.

If members of the community want to have their views heard, however, they have a better chance in the Free Press, which devotes more space than the News to reader opinions. In 1988, the Free Press printed 3,803 letters from readers, nearly half again as many as the 2,497 in the News.

B. Free Press Coverage of Race Relations.

In Detroit, which in 20 years changed from two-thirds white to two-thirds black,¹⁷ race has been the subliminal theme, the subtext of almost every news story, regardless of subject. Racial undercurrents informed news of crime, housing, schools, transportation, employment or urban redevelopment.

The Free Press has devoted a large share of its resources to exposing racial injustice and division, attempting to lead the white community toward tolerance of racial integration.¹⁸ Since the mid-1960s, blacks and other minorities have appeared with frequency in Free Press news stories beyond the arenas of entertainment, sports and crime. The Free Press has also moved with alacrity

¹⁷ The city's black population rose from 29 percent in 1960 to 63 percent in 1980. Neithercut, *supra* n.13, at 6.

¹⁸ Three of the Free Press' seven Pulitzer Prizes have been awarded for such coverage:

In 1968, the Free Press was awarded the Pulitzer Prize for distinguished local reporting for its coverage of the 1967 Detroit race riot and its aftermath.

In 1981, Taro Yamasaki of the Free Press won the Pulitzer Prize for outstanding feature photography, for his photographic series showing close-up views of life behind bars at Michigan's Jackson Prison.

In 1989, Free Press photographer Manny Crisostomo won the Pulitzer Prize for outstanding feature photography for his series portraying a year in the life of a Detroit inner city high school.

to hire black reporters and editors.¹⁹ The News' coverage of race relations during that period often failed to reflect the same concern for the black community.

Historians and others have noted the differences in the two newspapers' coverage of racial subjects in that period.²⁰ On the news pages during the '60s and '70s, the Free Press more often tended to report straightforwardly the emerging racial and civil rights issues and the rise and demands of new black organizations. Reports of those events by the News often reflected assumptions, widespread in the white community, that the expression of black discontent was inspired by "outside agitators." Fine, *supra* n.20, at 123. The examples that follow illustrate the role played by the Free Press in counterbalancing the perspective expressed by the News:

—A few weeks before the July, 1967 riot that devastated Detroit, a black man was killed in a city park while protecting his pregnant wife from harassment by a gang of white toughs. The incident horrified the black community. The manner in which it was reported reinforced the perception that crimes against blacks were not taken as seriously by whites as crimes against whites.

The Michigan Chronicle, a black-owned weekly, reported the story in detail. The Free Press carried the story on page one, with pictures of the victim's wife and the accused. The Detroit News briefly reported the slay-

¹⁹ As of June 30, 1989, blacks and minorities make up 17 percent of the professional staff of the Free Press and 11.5 percent of the newsroom supervisors. At the News, the comparable figures are 11.8 percent and 7.4 percent. (Telephone conversations by Free Press writer Barbara Stanton with Detroit News vice president of human resources, Robert Taylor, and Free Press administrative assistant to the executive editor, Grace Bennett [July 14, 1989]).

²⁰ See S. Fine, *Violence in the Model City: The Cavanagh Administration, Race Relations and the Detroit Riot of 1967* (1989) (hereafter referred to as "Fine"); B. Widick, *Detroit: City of Race and Class Violence* (1989) (hereafter referred to as "Widick").

ing on page six, with no mention of the racial issues. A black Detroit News reporter later told a Kerner Commission seminar that when he insisted the paper should run a picture of the victim's wife, he was told, "We don't want to get involved in race issues." Fine, *supra* n.20, at 150.

—Immediately after the 1967 riot, the Free Press published an analysis of the deaths of the 43 who died—33 blacks and 10 whites—and concluded that the majority of the deaths were attributable to nervous, ill-trained or trigger-happy guardsmen and police. The Free Press reported that no charges had been brought against anyone in connection with most of the deaths, which were attributed in official reports to gunfire by unknown persons. The News offered a reward the week after the riot for information regarding the deaths of four white victims. When criticized for showing no concern for black victims, the News responded that the slayings of blacks had all been solved by that time. *Id.* 299-300, 358.

—The News published stories after the riot, drawn from unnamed sources, reporting that organized black snipers had been operating in the city. No evidence was ever found to support those claims by any investigatory entity, including the Kerner Commission, New Detroit (the city's urban coalition), or law enforcement authorities. Widick, *supra* n.20, at 188.

—In 1968, the year after the riot, the News began a daily police blotter feature called Crime on Detroit Streets, which detailed every mugging and purse-snatching in the city. The feature described suspects by race. Some of the stories were accompanied by boxes listing the number of whites victimized by blacks and vice versa.

—In 1971, with the city in turmoil over school integration, the News again relied upon unnamed sources to report that "a deliberate, well-financed effort was being made by outside agitators to cripple the schools in the

hope of toppling the system." Widick, *supra* n.20, at 215-16.

The tone and content of the News' coverage of the black community in 1989 is significantly different from the tone and content of its coverage during the 1960s. The point remains that during a volatile period in the city's history, Detroit benefitted greatly from having two independent editorial perspectives.

C. Free Press Investigative Reporting.

The late J. Montgomery Curtis, long-time executive director of the American Press Institute, once said that the measure of a great newspaper is its ability to publish exclusive stories of great importance and its willingness to take unpopular editorial positions early in the debate. The Free Press continues to meet this measure by leading the Detroit community in exposing injustices and demanding social reforms:

—In 1988, a Free Press series exposed and documented a pattern of racially discriminatory lending practices by Detroit banks. The series prompted half a dozen local banks to pledge three billion dollars for home mortgage and improvement loans and for business development within the city—an unprecedented financial commitment to the city by its own financial institutions.²¹

—In 1987, a Free Press series on the causes of Michigan's unusually high infant death rate motivated the Michigan legislature, health department, and private foundations to commit more than \$2.5 million in additional spending on prenatal care and nutrition.²²

—In 1986, the Free Press ran a series of stories on the state's treatment of juvenile offenders. The series ex-

²¹ App.: "Detroit Banks: The Race for Money."

²² App.: "The Silent Epidemic."

posed the absence of accountability by the courts and the state's department of social services, and inadequate sentencing and rehabilitation.²³ Within a year, the Michigan legislature enacted a statute making juvenile court proceedings public.

—In 1985, a Free Press series on the illegal early release of inmates from state prisons, caused by a serious shortage of prison space, prompted a \$750 million state prison building program which is intended to double the number of prison beds.²⁴

—In 1980-81, the Free Press set up its own foreign bureaus in Canada, Africa and Eastern Europe, at a time when many United States newspapers had long since abandoned expensive overseas operations and opted to rely on wire coverage instead. The News has no similar system of full-time correspondents abroad. Free Press foreign coverage has included special reports on the African National Congress, the birth of Solidarity in Poland, Palestinians under Israeli rule, Israel, and the Soviet Union.

The number of Pulitzer Prizes is not an infallible measure or the only measure of a newspaper's quality, but it is an indication of it. Since 1932, the Free Press has won seven of the 11 Pulitzer Prizes awarded to Michigan newspapers; the Detroit News has won two.²⁵

* * *

²³ App.: "Young Outlaws."

²⁴ App.: "Revolving Door Prisons."

²⁵ Pulitzer Prizes have been awarded to the Free Press for its local news and investigative reporting, public service, editorials, photography, and mastery of language:

1932: For mastery of the English language, to staffers Douglas Martin, James Pooler, William Richards, John Sloan and Frank

Opponents of the JOA have suggested that once financial pressures on the two papers are eased, attention to quality and serious reporting will diminish. But in what may be the only systematic study of the content of JOA papers, the newspapers in the cities of San Francisco, Albuquerque, Knoxville, and Charleston were determined to behave more like competitors than monopolists after JOAs were approved.²⁶

Amici would prefer that what has been called the "last great American newspaper war" would go on forever in Detroit. Without the help of the Newspaper Preservation Act, it cannot.

Webb, for their coverage of an American Legion convention parade in Detroit.

1945: For most distinguished and meritorious public service, to staffer Ken McCormick for investigating corruption among state legislators in Lansing. McCormick's work anticipated investigatory journalism by nearly 30 years.

1955: For distinguished editorial writing, to associate editor Royce Howes for explaining the causes of a wildcat UAW strike against Chrysler. The Free Press pioneered the field of labor reporting.

1956: For distinguished local reporting on a deadline, to executive editor Lee Hills for his daily coverage of three weeks of "secret" negotiations among the UAW, Ford, and General Motors which culminated in the first guaranteed annual wage.

1968: For distinguished local reporting, to staff coverage of the 1967 Detroit riot and its aftermath.

1981: For outstanding feature photography, to Taro Yamasaki for series on life behind bars at Jackson Prison.

1989: For outstanding feature photography, to Manny Crisotomo for series on a year in the life of a Detroit high school.

Sports writer Mitch Albom's regular columns about such issues as the temptations faced by athletes to abuse drugs, alcohol, and steroids; ethical issues in professional sports; and youthful dreams of escaping from city ghettos by way of the boxing ring or basketball court won the Associated Press' best sports columnist award for three consecutive years, from 1986-1989.

²⁶ S. Lacy, "Content of Joint Operation Newspapers," in *Press Concentration and Monopoly* (Picard, ed. 1988).

In most of the country, including 1,505 American cities with monopoly press ownership, there is no diverse and competitive press. Few of the 25 remaining cities with separately owned newspapers have a genuine rivalry. Most often in the remaining large, dual-newspaper markets, the competition is between one dominant, healthy newspaper and a failing or marginal rival.

It is 158 years since the Democratic Free Press and Michigan Intelligencer first appeared on the brick-and-mud streets of Detroit. In its infancy, the newspaper supported Andrew Jackson for president and crusaded for statehood for Michigan. It dispatched reporters to the Civil War and sent Michigan's first correspondents to Washington. It hosted the meeting in 1868 where the Associated Press was born and in 1898 it christened Detroit's baseball team the Tigers, for the players' orange-and-black-striped socks.

In Detroit, the ideal of two independent and countervailing newspapers still exists. What the Newspaper Preservation Act seeks to protect, we have and wish to preserve.

CONCLUSION

The editorial diversity that the Newspaper Preservation Act was enacted to preserve is more than a legislatively identified public interest. It is the fundamental prerequisite of a vigorous and free press—a foundation stone of the Bill of Rights and an essential element of democratic society.

The petitioners do not challenge the legislative judgment that first amendment interests in a free and vigorous press outweigh the interests in competition that are protected by the antitrust laws, but they demand a construction of the Newspaper Preservation Act that would effectively deprive the Attorney General of the power to execute his legislative mandate to preserve editorial diversity. The Act must be construed in a way that

permits the Attorney General to effectuate the purpose of the Act. He must be allowed the discretion to apply the term "failing newspaper" to preserve actual editorial diversity.

The Free Press' death would mean more than the loss of just 2,000 jobs in a city that can ill afford to lose one, or of just another vehicle for advertising, or another source for the lottery numbers and the sports scores. Its loss would be the death of just what the Newspaper Preservation Act was meant to save: a bold, idealistic, and irreverent newspaper that to this day remains faithful to the best traditions of a free press.

Respectfully submitted,

BARBARA HARVEY
925 Ford Building
Detroit, MI 48226
(313) 962-2770

*Counsel for Amici Curiae
Jane Daugherty, et al.*

Dated: August 11, 1989

(15)

No. 88-1640

Supreme Court, U.S.

FILED

AUG 11 1989

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia

BRIEF AMICI CURIAE OF NEWSPAPER DRIVERS
& HANDLERS, TEAMSTERS LOCAL NO. 372,
DETROIT MAILERS UNION,
TEAMSTERS LOCAL NO. 2040, AND
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL NO. 79 IN SUPPORT OF RESPONDENTS

GERRY M. MILLER
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202
(414) 271-4500
Counsel of Record
for Amici Curiae

Of Counsel:

FRANCIS J. KORTSCH
788 N. Jefferson Street
Milwaukee, Wisconsin 53202

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia

BRIEF AMICI CURIAE OF NEWSPAPER DRIVERS
& HANDLERS, TEAMSTERS LOCAL NO. 372,
DETROIT MAILERS UNION,
TEAMSTERS LOCAL NO. 2040, AND
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL NO. 79 IN SUPPORT OF RESPONDENTS

CONSENT OF PARTIES

Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with the Clerk of Court.

INTEREST OF AMICI

Newspaper Drivers & Handlers, Teamsters Local No. 372, is a Detroit area labor organization and subordinate body of the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen & Helpers of America, AFL-CIO. The organization is dedicated to protecting the welfare and job security of its members, including five hundred twenty-two (522) circulation drivers and district managers presently employed by the Detroit Free Press.

The Detroit Mailers Union, Teamsters Local No. 2040, is a Detroit area labor organization and subordinate body of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO. The organization is dedicated to protecting the welfare and job security of its members, including one hundred twenty-two (122) Detroit Free Press employees handling the assembly and insertion of printed materials.

Service Employees International Union, Local No. 79 is a Detroit area labor organization and subordinate body of the Service Employees International Union, AFL-CIO. The organization is dedicated to protecting the welfare and job security of its members, including eighty-six (86) security and office maintenance workers presently employed by the Detroit Free Press.

Amici ("Unions") have a direct interest in the approval or disapproval of the proposed joint operating agreement ("JOA") between the Detroit Free Press and the Detroit News. If the JOA is approved, most of the seven hundred thirty (730) jobs held by their members at the Free Press will be preserved. If the JOA is denied, these 730 members will be left without jobs. Accordingly, the Unions have a strong interest in urging this Court's affirmance of the decision below.

ARGUMENT

As three labor organizations representing over 700 employees of the Detroit Free Press, we urge this Court to affirm the decision of the United States Court of Appeals for the District of Columbia upholding the JOA between the Detroit Free Press and the Detroit News.

The Unions' first concern is for the welfare of their members, some of whom have been employees of the Free Press for decades. While disparate voices have advanced arguments in support of and in opposition to the JOA, the Unions' focus is solely on the economic well-being of hundreds of working men and women whose lives will be drastically affected by this Court's decision. We urge that the voices of these less powerful but more numerous interested parties be heard and considered by the court in reaching its decision.

The Unions' decision to support the JOA is based on a careful review of all available information regarding the competition between the Free Press and the News. The Unions participated in the administrative hearings as intervenors in opposition to the JOA. The Unions' opposition was based on the fact that they did not, at that time, believe the Free Press would close its doors if the JOA was not approved. The Unions sought to protect *all* their members' jobs at the Free Press by fighting for the continued existence of two independent newspapers in Detroit. However, events subsequent to the administrative hearings have convinced the Unions that if the JOA is not approved, the Free Press will be closed and the Unions' members at the Free Press will lose their jobs.¹

On January 21, 1988 after the administrative hearings were completed and a decision had issued, the full Board of Directors of Knight-Ridder met and announced that the losses of the Free Press could no longer be subsidized if the JOA was not approved. This announcement was followed by the release of Knight-Ridder's annual report, which stated that its board had decided that "if the application for a joint operating agreement is not ap-

¹ In addition to the Unions' 730 members, approximately 1,250 other Free Press employees will lose their jobs if the JOA is not approved. Mem. Op. and Order on Application for Temporary Restraining Order, p. 17 (D.D.C. Case No. 88-2322, Green, J.).

proved, the company would withdraw from the newspaper publishing business in Detroit." (Knight-Ridder Annual Report at 16).² In addition, advertising revenues and circulation have declined since the administrative law judge rendered his decision in this matter.³ These facts have amply convinced the Unions that the Free Press will indeed close if the JOA is not approved, and that the Unions' Free Press members must now accept the lesser of two evils: a JOA between the Free Press and the News with most, but not all jobs being preserved; or, if the JOA is denied, all the Unions' Free Press members being left without jobs. Given this choice, the Unions wholeheartedly endorse the proposed JOA.

² After Knight-Ridder publicly announced that it would close the Free Press if the JOA was not approved, the Unions requested withdrawal of their statements in opposition to the JOA application. Attorney General Meese granted these requests in his Decision and Order at p. 9, footnote 4.

³ Mem. Op. & Order on Motions for Summary Judgment, p. 9 (D.D.C. Case No. 2322, Revercomb, J.).

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

GERRY M. MILLER
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202
(414) 271-4500
Counsel of Record
for Amici Curiae

Of Counsel:

FRANCIS J. KORTSCH
788 N. Jefferson Street
Milwaukee, Wisconsin 53202

Dated: August 11, 1989

16
No. 88-1640

FILED

AUG 11 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia

BRIEF AMICI CURIAE OF UNION LEADERS
REPRESENTING DETROIT FREE PRESS EMPLOYEES
IN SUPPORT OF RESPONDENTS

BRUCE A. MILLER
DUANE F. ICE
Counsel of Record
MILLER, COHEN, MARTENS
& ICE P.C.
17117 W. Nine Mile Road
Suite 1400
Southfield, MI 48075
(313) 559-2110

5 PR

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
v. *Petitioners,*

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia

**BRIEF AMICI CURIAE OF UNION LEADERS
REPRESENTING DETROIT FREE PRESS EMPLOYEES
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI

The *amici curiae* submitting this brief are six leaders of principal unions representing 929 employees at the Detroit Free Press. They range in size from as few as 18 to as many as 602 members. The *amici* obviously have a direct interest in the outcome of this appeal, which will likely determine whether their members will continue to have jobs at the Free Press. The *amici* are described as follows:

Donald Kummer, administrative officer, The Newspaper Guild of Detroit, Local No. 22, representing 602 news-

room, advertising sales, administrative and circulation clerical employees at the Free Press.

David H. Gray, president, Detroit Typographical Union, CWA, Local No. 18, representing 80 Free Press printers.

Thomas Brennan, president, Graphic Communication Union, Detroit, Local No. 13, representing 181 pressroom operators, including paper handling employees.

Richard Cummings, business agent, International Association of Machinists, Lodge Nos. 698 and 82, representing 26 machinists and mechanics.

Edward M. Patricca, Assistant Business Manager, International Brotherhood of Electrical Workers, Local No. 58, representing 22 electricians and electronic technicians.

David Ivers, business representative, International Union of Operating Engineers, Local No. 547, representing 18 Free Press employees maintaining heating, cooling and plumbing systems.

The parties have consented to the filing of this brief.

ARGUMENT

As Union leaders representing employees of the Detroit Free Press, we urge the Supreme Court to affirm the decision of the U.S. Court of Appeals upholding the joint operating agreement between the Detroit Free Press and the Detroit News. Our first concern is for the welfare of our members, some of whom have been employees of the Free Press for decades.

Our decision to support the JOA is based on a careful and in fact skeptical review of all the available information about the competition between the Free Press and the News. We participated in the administrative hearings as intervenors or interested observers and have searched earnestly for alternative answers that permit the survival of the Free Press outside a JOA. The role of

our members in the editing, sales and production of the Free Press has given us an especially advantageous position from which to observe this competition. To assure the survival and preservation of the editorial voice through the joint operating agreement seems to be the only alternative available.

Without the JOA, the available evidence suggests that the Free Press will close, which will mean the loss of hundreds of jobs. The Detroit News has followed an avowed strategy of maintaining its circulation and advertising lead by holding down prices. App. 87a-90a. The notion that the News, now reinforced by the resources of Gannett, might abandon that strategy and raise prices defies logic and common sense—as well as the stated intention of Gannett. JA 222-23; 228-29. A strategy to return to profitability cannot prove successful in the face of this type of pricing. If the JOA is not approved, the News can continue to prevent the Free Press from achieving profitability and gain a monopoly in the Detroit newspaper market simply by maintaining its present strategy. The Free Press, meanwhile, has no option that it could unilaterally take that would reverse this decade-long pattern of losses—as the Administrative Law Judge, the Attorney General, the district court and the court of appeals all recognized. App. 122a, 141a, 156a, 185a.

The Detroit newspaper competition led to the announcement by Knight-Ridder Newspapers Inc., owner of the Free Press, one and a half years ago, that it will close the paper if the JOA is denied. The losses of the Free Press, the board of directors said on January 21, 1988, could no longer be subsidized if the JOA were not approved. In its annual report for 1988 (at p. 16), Knight-Ridder Inc. said its board had decided that “if the application for a Joint Operating Agreement (‘JOA’) in Detroit is not approved, the company would withdraw from the newspaper publishing business in Detroit.”

The closing of the Free Press would result in the loss of nearly 2,000 jobs at the Free Press. Our membership would be deeply injured by the loss of those jobs. Detroit and Michigan would suffer from the loss of those jobs. The larger community would be deprived as well of a responsible, informative and lively alternative to the News. We believe the loss of the editorial voice of the Free Press would sharply diminish the quality and range of public debate on important issues and result in the loss of a strong advocate for the Detroit community.

For these reasons we strongly urge that the Supreme Court affirm the decision of the U.S. Court of Appeals and uphold the approval of the JOA.

This statement is submitted voluntarily and is solely the result of our belief that the best interest of our membership would be served by approval of the JOA.

Respectfully submitted,

BRUCE A. MILLER
DUANE F. ICE
Counsel of Record
MILLER, COHEN, MARTENS
& ICE P.C.
17117 W. Nine Mile Road
Suite 1400
Southfield, MI 48075
(313) 559-2110

August 11, 1989

14

Supreme Court, U.S.

FILED

No. 88-1640

AUG 11 1989

JOSEPH P. SPANIOLE, JR.
CLERK

**IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1989**

**MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al*,
Petitioners,**

v.

**RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al*,
Respondents.**

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia**

**BRIEF AMICI CURIAE OF
DETROIT RENAISSANCE, INC.,
THE CENTRAL BUSINESS DISTRICT ASSOCIATION,
GREATER DETROIT CHAMBER OF COMMERCE
IN SUPPORT OF RESPONDENTS**

**HERSCHEL P. FINK
RICHARD E. ZUCKERMAN*
DAVID B. JAFFE
HONIGMAN MILLER SCHWARTZ
AND COHN
2290 First National Building
Detroit, MI 48226
(313) 256-7800**

*** Counsel of Record**

5pp

1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al*,
Petitioners,

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, *et al*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia

BRIEF AMICI CURIAE OF
DETROIT RENAISSANCE, INC.,
THE CENTRAL BUSINESS DISTRICT ASSOCIATION,
GREATER DETROIT CHAMBER OF COMMERCE
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

This brief is submitted by three Detroit and Southeastern Michigan civic, business and economic development organizations. Consents of the parties to the filing of this brief have been filed with the Clerk. Together, the membership of the amici comprise a broad cross-section of businesses operating in the primary circulation area of the two respondent newspapers, Detroit Free Press and The Detroit News. The amici and their members share an interest in promoting the economic and social vitality of the region, and in preserving competitive and diverse news gathering organizations and editorial voices in their community. Members of the amici organizations are also substantial advertisers in the Free Press and News. The amici are more fully described below:

Detroit Renaissance, Inc., a Michigan nonprofit corporation, is devoted to the economic revitalization of the City of Detroit. The Board of Directors is composed primarily of chief executive officers of the major automobile companies, manufacturers, banks, utilities and commercial businesses in the Detroit area.

The Central Business District Association, a Michigan nonprofit corporation, is devoted to the improvement and vitalization of the Downtown Detroit business district. Membership is composed primarily of business owners and other business representatives.

Greater Detroit Chamber of Commerce, a Michigan nonprofit corporation, is a regional economic development organization composed of 4,200 business and professional firms in the three-county Greater Detroit area of Wayne, Oakland and Macomb counties. Its activities are aimed at enhancing the ability of Greater Detroit and Southeast Michigan's businesses to prosper locally and compete in national and international markets, and to attracting new businesses to the region.

ARGUMENT

As representatives of Detroit's major civic and business organizations, we urge the Supreme Court to uphold the finding of the U.S. Circuit Court of Appeals and approve the proposed joint operating agreement between the Detroit Free Press and The Detroit News. We believe that the JOA, while perhaps not a perfect answer to the harsh realities of newspaper economics, is the best means available to assure that this community is served by diverse editorial voices, competing sources of news and information and alternate means for many of our members as advertisers to communicate with large numbers of people.

The JOA, we are convinced, is necessary. We are persuaded that the Free Press meets the law's definition of "a failing newspaper." We have watched the long struggle between Detroit's two daily newspapers and followed the legal process by which the merits of the JOA have been weighed. The Free Press has been struggling for years against the fundamental reality that The Detroit News, despite the relative closeness of overall circulation numbers, enjoys a strong advantage in the primary market. As business people concerned with finding the most efficient means of communicating information about our products or services, our members understand the advantage The Detroit

News has in selling advertising, particularly to retail and classified advertisers who are concerned about the concentrated reach of the media in which they advertise. We understand the constraints under which the Free Press operates in trying to control its own destiny, constraints that limit its ability to dictate its own pricing strategy. At the same time, we recognize that the JOA would afford important opportunities for savings on the costs of production.

From the perspective of the business and civic community, the ideal would be, of course, the continuation of full and unbridled competition between the two papers. The Free Press has struggled for 10 years to compete with The Detroit News, and it is unreasonable to expect, in the face of steadily rising losses, that a failing economic enterprise will be sustained indefinitely. The law permitting JOAs was intended by Congress to minimize the damage to the community from the abandonment of the struggle by the weaker of the competitors. Detroit, we believe, needs the help of that law to preserve separate editorial voices and competing sources of information.

Our interest in preserving the two voices is in part born of a concern for the welfare of the community. The two newspapers deal with the community from quite different perspectives. They often disagree with each other, with us and with our members. We believe that the clash of ideas and viewpoints is healthy for our community. It is also important to maintain two strong, statewide newspapers. The loss of one of the Detroit newspapers, we are convinced, would result in diminution of Detroit's role in the state. There is, therefore, a substantial community interest in the survival of the Free Press.

Our members also have, we believe, a more direct business interest in the survival of both papers under a JOA. We believe the JOA would have distinct advantages over the survival of a single newspaper for the advertiser, as well as for the communication of information and viewpoints through the independent news and editorial columns of the papers. Detroit and Michigan need the Free Press to survive, and our business community needs the Free Press as well. The JOA represents the only practical means to assure that the Free Press will survive.

Therefore, we urge the Supreme Court to affirm the decision of the U.S. Circuit Court of Appeals and assure the survival of two newspapers for this community.

Respectfully submitted,

HERSCHEL P. FINK
RICHARD E. ZUCKERMAN*
DAVID B. JAFFE
HONIGMAN MILLER SCHWARTZ
AND COHN

2290 First National Building
Detroit, MI 48226
(313) 256-7800

* Counsel of Record

August 11, 1989

18
No. 88-1640

Supreme Court, U.S.
FILED

~~AUG 11 1989~~

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
RICHARD THORNBURGH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Of Counsel:

W. TERRY MAGUIRE
CLAUDIA JAMES

AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500

P. CAMERON DEVORE *
MARSHALL J. NELSON
KAREN I. TREIGER

DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

*Attorneys for American
Newspaper Publishers
Association*

Date: August 11, 1989

* Counsel of Record

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. THE OVERRIDING PURPOSE OF THE NEWSPAPER PRESERVATION ACT IS TO PRESERVE COMPETING NEWS AND EDI- TORIAL OPERATIONS	3
II. CONGRESS DELEGATED TO THE ATTOR- NEY GENERAL THE ROLE OF DETERMIN- ING WHEN A NEWSPAPER IS "FAILING"..	6
III. THE PURPOSES OF THE ACT CAN ONLY BE EFFECTUATED BY A FLEXIBLE, CASE-BY-CASE APPROACH	9
A. A Newspaper May Be Deemed "Failing" Before it Enters a Downward Spiral	9
B. The Failing Newspaper Test Is Based on Probabilities, not Certainties	12
C. The Test Is Whether the Individual News- paper Is Failing, Without Regard to its Ownership or Affiliation	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
<i>Associated Press v. United States</i> , 326 U.S. 1 (1944)	3
<i>Citizen Publishing Co. v. United States</i> , 394 U.S. 131 (1969)	5
<i>Committee for an Independent P-I v. Hearst</i> , 704 F.2d 467 (9th Cir.), cert. denied, 464 U.S. 892 (1983)	passim
<i>Michigan Citizens for an Independent Press v. Attorney General</i> , 695 F. Supp. 1216 (D.D.C. 1988)	12, 13
<i>Michigan Citizens for an Independent Press v. Thornburgh</i> , 868 F.2d 1385 (D.C. Cir. 1989)	passim
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	3
<i>Statutes</i>	
Newspaper Preservation Act, Pub. L. No. 91-353, -84 Stat. 466 (1970)	passim
15 U.S.C. §§ 1801-1804 (1982)	1
15 U.S.C. § 1801 (1982)	7
15 U.S.C. § 1802(5) (1982)	passim
15 U.S.C. § 1803(b) (1982)	7
<i>Other Authorities</i>	
<i>Attorney General's Order Approving Chattanooga Joint Operating Arrangement</i> , 45 Fed. Reg. 58733 (1980)	5, 12
<i>Decision and Order In the Matter of Application by Detroit Free Press, Inc., and The Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement (Attorney General)</i> Docket No. 44-03-24-8 (1988)	5, 8
<i>Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of a Joint Operating Arrangement (Attorney General Order 979-82)</i> , 47 Fed. Reg. 26472 (1982)	passim

TABLE OF AUTHORITIES—Continued

	Page
<i>Recommended Decision of the Administrative Law Judge, In the Matter of Application by Detroit Free Press, Inc., and The Detroit News, Inc., Docket No. 44-03-24-8 (1987)</i>	passim
<i>Legislative Material</i>	
116 Cong. Rec. S1783-92, S1808-09 (daily ed. Jan. 29, 1970)	3
116 Cong. Rec. S1786-87 (daily ed. Jan. 29, 1970)	6, 9, 10
116 Cong. Rec. S2006 (daily ed. Jan. 20, 1970)	14
116 Cong. Rec. H23152-68 (daily ed. July 8, 1970) ..	3
116 Cong. Rec. H23147 (daily ed. July 8, 1970)	14
S. Rep. No. 535, 91st Cong., 1st Sess.	5, 14
The Failing Newspaper Act: Hearings on S.1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 545 (1967)	4
Newspaper Preservation Act: Hearings on H.R. 19123 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 90th Cong., 2d Sess. (1968)	passim
Newspaper Preservation Act: Hearings on H.R. 279 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 91st Cong., 1st Sess. (1969)	6, 10, 11
Newspaper Preservation Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969)	6, 14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1640

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,
v.

UNITED STATES ATTORNEY GENERAL
RICHARD THORNBURGH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF AMICUS CURIAE OF
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION**

STATEMENT OF INTEREST

American Newspaper Publishers Association ("ANPA") is a national trade association representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately ninety percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

ANPA has consistently supported the principles embodied in the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1982) (the "Act") and the mechanism the Act provides for advancing those principles. ANPA supported the Act when Congress first considered its enact-

ment and continues to believe that the Act's limited exemption to the antitrust laws provides useful and necessary support for important First Amendment values.

ANPA submits this brief *amicus curiae* in support of respondents' position regarding interpretation of the Act, specifically, the delegation of authority to the Attorney General, and the necessity for a flexible, case-by-case application of the Act's financial failure standard.*

ANPA agrees with the respondents' position that the decision of the Attorney General in this case was within the proper exercise of his delegated authority under the Act, but ANPA otherwise takes no position regarding the merits of the factual record upon which the Attorney General and the lower courts based their decisions regarding the joint newspaper operating arrangement ("JOA") at issue in this case.

SUMMARY OF ARGUMENT

The purpose of the Newspaper Preservation Act is to allow a "failing newspaper" to enter into a JOA when such an agreement will preserve competition in news and editorial operations. To this end, Congress expressly rejected the traditional "failing company" analysis in favor of a more flexible test that recognized the unique economics of newspaper competition. Congress also delegated to the Attorney General the authority to decide whether under that test a newspaper was failing.

The Court of Appeals' affirmance of the decisions of the District Court and the Attorney General and its rejection of petitioners' arguments are consistent with the Act and its legislative history. A contrary decision would seriously impair the availability of the Act to otherwise qualified newspapers that find themselves forced to seek refuge in the Act's limited antitrust exemption.

* Written consent of all parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

ARGUMENT

I. THE OVERRIDING PURPOSE OF THE NEWSPAPER PRESERVATION ACT IS TO PRESERVE COMPETING NEWS AND EDITORIAL OPERATIONS.

Local newspapers occupy a unique position among the news media in America. They cover news and public issues of concern to their communities with a thoroughness, immediacy, and accessibility unmatched by any other medium. When two newspapers compete on this plane, they provide the diversity of viewpoints, analysis, and editorial opinion that is a vital part of the democratic process—they sustain the "market place of ideas" on which modern First Amendment theory is grounded. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

Newspapers also offer a forum for local advertising, but in constant competition with an ever-expanding selection of other media.¹ When two newspapers compete with each other in this commercial marketplace, they may find in some cases that the market share committed to newspaper advertising simply is not large enough to sustain both newspapers. Even where the market itself may be large enough, the unique economics of newspaper competition may make the weaker competitor especially susceptible to failure, because of the close interrelationship between circulation and advertising. As the Court of Appeals succinctly observed in this case:

Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper that is short on advertising, so circulation drops further. The result

¹ The effect of competition from other media is well documented in the legislative history of the Act. See, e.g., 116 Cong. Rec. S1783-92, 1808-09 (daily ed. Jan. 29, 1970), H23152-68 (daily ed. July 8, 1970).

of this interrelationship is an apparently irreversible downward plunge that ends in business failure.

Michigan Citizens For an Independent Press v. Thornburgh, 868 F.2d 1285, 1288 (D.C. Cir. 1989).

The pervasive effect of this interrelationship goes even further than the court suggested. The concept that advertisers will prefer the newspaper that delivers the greatest number of readers, and thus the greatest number of potential customers, is well recognized. Losses in circulation affect not only revenues from subscribers, but also revenues from advertising. It is less obvious, but equally true, that newspaper readers prefer a newspaper that has more of the advertising they need: more discount food coupons, more home and job listings, more back-to-school sales, and so on. Losses in advertising thus lead to losses in circulation.

Less directly, but with even more serious consequences, a drop in either circulation or advertising revenue affects the financial ability of the newspaper to maintain news and editorial departments at levels necessary to compete effectively for readers, and eventually erodes the economies of scale necessary for financial stability. In simple terms, as the number of readers and number of pages decrease, the unit cost of producing and delivering the newspaper increases.

As all of these economic forces conspire against the weaker competitor, newspapers may find themselves locked in fierce competition just to avoid slipping into the secondary position. As one witness testified at the Senate hearings on the Act:

This spiraling, once commenced, accelerates rapidly and reversal of the trend is always difficult and sometimes impossible. It is almost always a fatal disease.

The Failing Newspaper Act: Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the

Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 545 (1967) (Statement of Charles Thieriot, President, Chronicle Publishing Co.)² A newspaper faced with this prospect will logically do whatever it takes in pricing and marketing to become or remain the leader in both circulation and advertising lineage.

Historically, these unique economic circumstances have forced some newspapers to close, some to merge, and others to enter arrangements whereby they maintain separate news and editorial staffs but conduct joint commercial operations. This last alternative, however, was effectively removed in 1969 when the Supreme Court held in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135 (1969), that one such joint operating arrangement in Tucson, Arizona, violated the antitrust laws. That decision threatened the present status of and future prospects for newspapers that depended or would come to depend on commercial cooperation with a competitor in order to survive to compete reportorially and editorially.

² In this brief the following short titles are used:

(a) *Decision and Order In the Matter of Application by Detroit Free Press, Inc., and The Detroit News, Inc., for Approval of a Joint Newspaper Operating Arrangement*, Docket No. 44-03-24-8 (1988) ("Detroit Attorney General Decision").

(b) *Recommended Decision of the Administrative Law Judge, In the Matter of Application by Detroit Free Press, Inc. and The Detroit News, Inc.*, Docket No. 44-03-24-8 (Dec. 29, 1987) ("ALJ Decision").

(c) *Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of a Joint Operating Arrangement* (Atty Gen. Order 979-82), 47 Fed. Reg. 26472 (June 18, 1982) ("Seattle Attorney General Decision").

(d) *Attorney General's Order Approving Chattanooga Joint Operating Arrangement*, 45 Fed. Reg. 58733 (Sept. 4, 1980) ("Chattanooga Attorney General Decision").

(e) S. Rep. No. 535, 91st Cong., 1st Sess. ("Senate Report").

[Continued]

Congress acted promptly to enact the Newspaper Preservation Act³ and provide a limited exception to the general application of the antitrust laws in order to preserve a basic First Amendment principle: that the American people are best served by a diversity of sources of information. The "failing newspaper" test of the Act was intended to replace the more stringent "failing company" standard that the Supreme Court had applied in *Citizen Publishing* and to reverse the effects of that decision. See *Independent Press*, 868 F.2d at 1288; Senate Report at 4; Statement of Sen. Bennett at S1788. In adopting the new test, Congress recognized the unique value of local newspapers to their communities and the importance of preserving competing voices even where economic competition might not be possible.

II. CONGRESS DELEGATED TO THE ATTORNEY GENERAL THE ROLE OF DETERMINING WHEN A NEWSPAPER IS "FAILING."

To avail itself of the Act's protection, a newspaper must seek the prior written consent of the Attorney General of the United States. The Attorney General must

² [Continued]

(f) 116 Cong. Rec. S1786-87 (daily ed. Jan. 29, 1970) (Statement of Sen. Bennett) ("Statement of Sen. Bennett").

(g) Newspaper Preservation Act: Hearings on S.1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) ("1969 Senate Hearings").

(h) Newspaper Preservation Act: Hearings on H.R. 279 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) ("1969 House Hearings").

(i) Newspaper Preservation Act: Hearings on H.R. 19123 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 90th Cong., 2nd Sess. (1968) ("1968 House Hearings").

³ Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970) (current version at 15 U.S.C. §§ 1801-1804 (1982)).

base his approval on two findings: first, that not more than one of the newspapers involved is other than a "failing newspaper," and second, that his approval will effectuate the policy and purpose of the Act. 15 U.S.C. § 1803(b).

The Act defines a "failing newspaper" as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5). The plain language of this test reflects Congress's intent to provide a realistic standard that focuses on the preservation of competing news and editorial points of view in the community. Once a probability of financial failure has been determined, the Attorney General must approve an application where the purpose of the Act is served.

The preamble to the Act states its unambiguous purpose:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

15 U.S.C. § 1801.

In upholding the Attorney General's decision to approve the present JOA, the Court of Appeals correctly noted:

Congress . . . delegated to the Attorney General, not to us, the delicate and troubling responsibility of putting content into the ambiguous phrase "probable danger of financial failure."

Independent Press, 868 F.2d at 1297. In this case, the Attorney General requested that an ALJ hold a hearing,

he considered the ALJ's findings of fact, and consistent with his delegated responsibility, he made independent legal conclusions. It is the conclusions of the Attorney General, not the ALJ, that have legal significance. See *id.* at 1294.

In reaching these conclusions, the Attorney General expressly adopted the "failing newspaper" test enunciated by the Ninth Circuit in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983): "Is the newspaper suffering losses which more than likely cannot be reversed?" *Independent Press*, 868 F.2d at 1292; *Hearst*, 704 F.2d at 478. As the D.C. Circuit appropriately held, the Attorney General's adoption and application of the *Hearst* test was reasonable. *Independent Press*, 868 F.2d at 1291. He acknowledged the ALJ's opinion that, in theory, both papers *might* reverse their losses if they both raised advertising and circulation prices. Detroit Attorney General Decision at 9 n.3. However, he concluded that it was highly improbable that one or the other newspaper would unilaterally raise its prices, and the consequence if they did not—the loss of an editorial voice in Detroit—was too great a risk.⁴ See *Independent Press*, 868 F.2d at 1296. Given the overriding purpose of the Act, to maintain news and editorial competition, this decision was not unreasonable. In fact, it reflects precisely the kind of analysis Congress intended in delegating the ultimate decision to the Attorney General as the person best qualified to balance public policy objectives and decide the appropriateness of JOA applications:

Congress . . . did not place responsibility for reconciling the conflicting policies and values called for in

⁴ Given the fact that the newspapers could not lawfully agree to raise their prices and the potentially fatal consequences of being the first to do so unilaterally, the Attorney General's refusal to gamble on this possibility is understandable. (See discussion at pp. 4-5, *supra*.)

this type of case upon the Antitrust Division, but rather on the Attorney General, who might be thought to have a broader perspective.

Id. at 1293.

In this case, the Attorney General acted well within the proper scope of his responsibility by applying the *Hearst* test to the Detroit newspapers' JOA application. He determined that at least one of the newspapers involved was failing and that his approval would permit editorial and reportorial competition to survive in Detroit, thus achieving the legislative purposes of the Act.

III. THE PURPOSES OF THE ACT CAN ONLY BE EFFECTUATED BY A FLEXIBLE, CASE-BY-CASE APPROACH.

A. A Newspaper May Be Deemed "Failing" Before it Enters a Downward Spiral.

Congress clearly intended that each proposed JOA be considered on its own merits and considered in light of its contribution to achieving the Act's purpose. As Attorney General Smith noted:

Congress intended the determination whether a newspaper is "failing" to be made case-by-case, based upon a weighing of all relevant factors and *without the application of particular per se rules*.

Seattle Attorney General Decision, 47 Fed. Reg. at 26474 (emphasis added). The Attorney General's observations echoed the remarks of Senator Bennett: "The factors which are to be considered . . . in determining whether a newspaper is failing would vary with the particular circumstances of the newspaper involved." Statement of Sen. Bennett at S1786-87. See also, 1968 House Hearings at 68 (Statement of John L. Donahue, Jr., Publisher, Tucson Daily Citizen) (Act would require "case-by-case determination of failure"). The Attorney General's analysis of the Detroit JOA application is consistent with that congressional mandate.

By creating a flexible definition of "failing newspaper"—i.e., "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. § 1802(5))—Congress intended to allow newspapers to enter into a JOA before one of them enters a downward spiral, the economic point of no return.⁵ The legislative history makes this plain:

[N]ewspaper stability and continued life of a newspaper cannot be achieved by requiring an exhaustion of all available resources before the failing company doctrine is deemed applicable In other words, the court should be able to recognize the trend toward failure and not be required to wait until it is irreversible.

Statement of Sen. Bennett at S1786-87. See also 1968 House Hearings at 41 (statement of Rep. Matsunaga) ("If . . . a failing newspaper is allowed to go into a joint operating agreement at a stage sufficiently early in its financial decline, the chances for its continuing as a separate newspaper are much better.").

Forcing a newspaper to reach the point of accelerating decline before it is entitled to relief under the Act would place it in a position where it may well have no appeal as a JOA partner. In House hearings on a similar bill introduced in the 90th Congress, Representative Matsunaga described the problem:

Since the most important assets of a newspaper are its personnel and reputation, these may be lost as

⁵ The dire situation of a newspaper finally caught in the "downward spiral" is well recognized. The only appellate court decision that interprets the financial standard of the Act acknowledges that a newspaper in a downward spiral is virtually certain to be in "probable danger of financial failure." *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 479 (9th Cir.), cert. denied, 464 U.S. 892 (1983). The legislative history of the Act also acknowledges the irreversible situation of a newspaper caught in a downward spiral. See, e.g., 1969 House Hearings at 12 (statement of Congressman Matsunaga on behalf of sponsors).

financial failure approaches. By the time the newspaper is sufficiently in trouble to satisfy the present "failing company" doctrine, as it had been in cases of industrial companies, it may have little value as an acquisition by another newspaper.

1968 House Hearings at 40 (statement of Rep. Matsunaga). See also 1969 House Hearings at 9 (statement of Rep. Matsunaga on behalf of sponsors) ("it is probable that the disparity of economic power will tend to destroy any remaining workable competition between the existing entities").

Although the ALJ in this case believed that the *Free Press* was not yet in a downward spiral, (See ALJ Decision at 100-01; 113), the Attorney General's determinations that it was nevertheless a "failing newspaper" and that a JOA would preserve news and editorial competition in Detroit, were reasonable and consistent with the intent of the Act. See *Independent Press*, 868 F.2d at 1291. The Court of Appeals agreed, in part, because the future of the *Free Press* was "dependent on the competitive behavior of the *News*." *Id* at 1292.

The Ninth Circuit in *Hearst* also recognized that in reversing *Citizen Publishing*, Congress intended to allow "newspapers to enter into a JOA prior to the time the financially troubled newspaper is on its death bed." *Hearst*, 704 F.2d at 474. Although *Hearst* involved a failing newspaper that the court found was in a downward spiral, it defined a broader standard for "failure":

The Act should receive a commonsense construction. The probable danger standard is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?

Id. at 478; see *Independent Press*, 868 F.2d at 1292.

B. The Failing Newspaper Test Is Based on Probabilities, Not Certainties.

The Ninth Circuit held that proponents of a JOA must show the "economic fact of *probable* failure." *Hearst*, 704 F.2d at 479 (emphasis added). This approach is entirely consistent with the legislative history discussed above. The Act requires a showing that the newspaper be "in *probable* danger of financial failure." 15 U.S.C. § 1802(5) (emphasis added). The Ninth Circuit's requirement that the newspaper show that it is suffering losses which "more than likely" cannot be reversed is also wholly consistent with this language. *Hearst*, 704 F.2d at 478; 15 U.S.C. § 1802(5).

Consistent with the holding of the Ninth Circuit, previous Attorneys General have made it clear that the Act mandates a review of economic probabilities. In conjunction with his review of the Seattle application, Attorney General Smith stated that the "'danger of financial failure' must be assessed as a matter of probabilities, not certainties." Seattle Attorney General Decision, 47 Fed. Reg. at 26473. In his order approving the Chattanooga JOA, Attorney General Civiletti stated: "There does not appear to be any reasonable prospect that the Times' history of accelerating losses can be reversed." Chattanooga Attorney General Decision, 45 Fed. Reg. at 58733.

The District Court found that the ALJ in this case did not properly analyze the probability of financial failure when he asked whether the applicant demonstrated "irreversible conditions which will lead to dominance and the downward spiral." See *Michigan Citizens for an Independent Press v. Attorney General*, 695 F. Supp. 1216, 1220 (D.D.C. 1988); ALJ Decision at 120-21. The District Court correctly concluded that the ALJ's rigid application of the Act was inconsistent with precedent and legislative history and tended to subvert the policy and purpose of the Act. The District Court therefore concluded properly that the Attorney General was correct in

rejecting the ALJ's legal conclusion. See *Independent Press*, 695 F. Supp. at 1220.

The ALJ's conclusion was not consistent with the Act, its legislative history, or its consistent interpretation by succeeding Attorneys General and the courts. The ALJ's standard would pose a serious threat to the availability of the Act for newspapers that are "in probable danger of financial failure" but may not, for a variety of reasons, immediately face "dominance and the downward spiral." ANPA submits that the Attorney General, the District Court, and the Court of Appeals were all correct in rejecting the ALJ's misinterpretation of the standard, and indeed, that the Attorney General's interpretation is crucial to the proper functioning of the Act.

The focus of the ALJ and petitioners on the "downward spiral" as a *per se* test under the Act comes dangerously close to resurrecting the "failing company" doctrine as applied to newspapers by the Supreme Court in *Citizen Publishing*. By expressly rejecting *Citizen Publishing's* test, Congress clearly stated its intention that a newspaper be permitted to participate in a JOA before its financial condition is grave enough to satisfy the "failing company" standard of *Citizen Publishing*. See *Hearst*, 704 F.2d at 474, 476, 479 n.10 and legislative history cited therein; Seattle Attorney General Decision, 47 Fed. Reg. at 26473-74.

The ALJ's "per se" test, implicitly supported here by petitioners, demands economic *certainties*. See *Independent Press*, 868 F.2d at 1292 n.7. The required *certainty* of failure was the very reason that Congress specifically rejected the Supreme Court's *Citizen Publishing* ruling. Thus, the Court of Appeals properly upheld the District Court's affirmance of the Attorney General's probability-based decision as being firmly grounded in the language and purposes of the Act.

C. The Test Is Whether the Individual Newspaper Is Failing, Without Regard to Its Ownership or Affiliation.

The ALJ's conclusion that an applicant must show that it is inevitably confronted with dominance and a "downward spiral" is equally flawed because it has the inevitable, though perhaps unintended, effect of focusing on a corporate parent's investment in an applicant newspaper and not on the applicant's status standing alone. Indeed, the ALJ predicted that the Free Press would "not enter the downward spiral so long as Knight-Ridder remains in Detroit." ALJ Decision at 113; see *Independent Press*, 868 F.2d at 1295 n.12. The Act, however, unambiguously requires that the determination of whether a newspaper is, in fact, "in probable danger of financial failure" be made "regardless of its ownership or affiliations." 15 U.S.C. § 1802(5).

The Senate Report explains why this phrase was included in the Act: "Whether a newspaper is failing should be determined on the basis of the operation in the particular city rather than on the basis of the sweep of the newspaper owner's business interests." Senate Report at 5. During floor debate, Senator Hruska noted that if this language was not included "the test would not be whether the newspaper was failing, but whether the owners of the newspaper were themselves failing." 116 Cong. Rec. S2006 (daily ed. Jan. 30, 1970) (statement of Sen. Hruska). See also 116 Cong. Rec. H23147 (daily ed. July 8, 1970) (statements of Reps. Eckhardt & Kastenmeier) (confirming corporate owner's other assets not to be taken into account in determination of "failing newspaper"); 1969 Senate Hearings at 306 (statement of Sen. Cohen) ("[U]nder this bill . . . you could not take into consideration what the other affiliates or subsidiaries of that newspaper were doing."). The Ninth Circuit also recognized the Act's requirement that the "ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent." *Hearst*, 704 F.2d at 480. Accord, Seattle Attorney Gen-

eral Decision, 47 Fed. Reg. at 26474. The D.C. Circuit correctly noted that the ALJ's prediction of Knight-Ridder support for the Free Press was "an impermissible consideration under the NPA." *Independent Press*, 868 F.2d at 1295 n.12.

CONCLUSION

The importance of not allowing the "in probable danger of financial failure" standard to be misinterpreted cannot be overstated. The Attorney General's refusal to adopt a per se rule, his consideration of the particular circumstances of the applicants in this case, and his analysis of applicable precedent resulted in a reasonable decision, fully consistent with the policy and purpose of the Act. The Court of Appeals correctly upheld the District Court's affirmance of the Attorney General's decision.

The Newspaper Preservation Act has preserved news and editorial competition in at least eighteen cities across the United States. Affirmance of the Attorney General's legal interpretation of the "in probable danger of financial failure" test is wholly consistent with Congress's intention to provide a viable vehicle for preserving news and editorial competition in all future qualifying cities. This legal interpretation should be upheld.

Respectfully submitted,

Of Counsel:

W. TERRY MAGUIRE
CLAUDIA JAMES

AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500

Date: August 11, 1989

P. CAMERON DEVORE *
MARSHALL J. NELSON
KAREN I. TREIGER

DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

*Attorneys for American
Newspaper Publishers
Association*

* Counsel of Record